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No. 03-
(Capital Case)

In the Supreme Court of the United States

DONNIE E. JOHNSON,

Petitioner,

v.

RICKY BELL, WARDEN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

C. MARK PICKRELL
Counsel of Record
3200 WEST END AVENUE
SUITE 500
P.O. BOX 50478
NASHVILLE, TN 37205-0478
(615) 356-4978

CHRISTOPHER M. MINTON
OFFICE OF THE FEDERAL
PUBLIC DEFENDER
810 BROADWAY
SUITE 210
NASHVILLE, TN 37203
(615) 736-5047

Counsel for Petitioner

Becker Gallagher Legal Publishing, Inc.
800.890.5001

QUESTIONS PRESENTED
(Capital Case)

The United States Court of Appeals for the Sixth Circuit rejected Donnie Johnson's federal habeas appeal by relying on this Court's decision in *Bell v. Cone*, 535 U.S. 685 (2002), to the explicit exclusion of this Court's more recent opinion in *Wiggins v. Smith*, __ U.S. __, 123 S. Ct. 2527 (2003). Therefore, the court of appeals' decision raises two questions:

1. Whether an attorney in a capital murder trial provides effective legal assistance to the defendant when the attorney, who has never tried a capital case, conducts no legal research prior to trial and conducts virtually no factual mitigation investigation prior to sentencing.

2. Whether the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, mandates a minimum level of investigation by a capital-murder defendant's attorney in preparation for the sentencing phase of the defendant's murder trial.

The court of appeals determined that, even if Petitioner's trial attorney had failed to provide constitutionally effective assistance, Petitioner was not prejudiced by counsel's deficient performance because the mitigating evidence Petitioner presented to the State courts on post-conviction review would not "likely have led to a different result." Therefore, the court of appeals' decision raises an additional question:

3. Whether a reviewing court errs by requiring that defense counsel's deficient performance *more likely than not* affect the jury's choice of a death sentence in order to show

prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984).

The court of appeals rejected, without explanation, Johnson's timely request to amend the certificate of appealability previously granted by the district court, making review as occurred in this Court's recent decision in *Miller-El v. Cockrell*, 537 U.S. 322 (2003), impossible. Therefore, the court of appeals' denial of Johnson's request to amend the certificate of appealability raises two questions:

4. Whether the courts of appeals must provide a reviewable explanation for a decision to deny or amend a certificate of appealability.

5. Whether the proper remedy for a court of appeals' failure to explain a denial of a certificate of appealability is remand of the case to the court of appeals so that it may explain its previous denial of the certificate.

PARTIES TO THE PROCEEDING

Donnie E. Johnson, a prisoner held by the State of Tennessee under a sentence of death.

Ricky Bell, Warden of the State of Tennessee's Riverbend Maximum Security Institution, in his official capacity.

There are no corporations connected with this case for purposes of Sup. Ct. R. 29.6.

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JURISDICTION

The court of appeals' judgment was entered on September 10, 2003. A timely petition for rehearing was denied on November 25, 2003 (App., *infra*, 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of the U.S. Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. CONST. amdt. VI, cl. 6.

28 U.S.C. § 2253 (c) provides:

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court . . . .

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT

This case raises important, recurring questions regarding the legal standards for the review of claims of ineffective assistance of counsel under the Sixth Amendment in death-penalty cases. In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court established a two-prong test for determining the adequacy of defense representation during the sentencing phase of capital murder trials. Since that time, as asserted by the court of appeals in this case, this Court has struggled to establish a workable, articulable minimum standard for examining attorney representation during capital trials. Last Term, this Court emphasized "reasonableness under prevailing professional norms" as the minimum standard of representation expected of defense attorneys in capital cases. *Wiggins v. Smith*, __ U.S. __, 123 S. Ct. 2527, 2535 (2003)(citing *Strickland*, 466 U.S. at 688). Prior to *Wiggins*, however, this Court held in *Cone v. Bell*, 535 U.S. 685, 697 (2002), that defense counsel who have "failed to adduce mitigating evidence and [have waived] closing argument" may nonetheless perform consistently with the minimum standards of the Sixth Amendment. The inconsistency between *Cone* and *Wiggins* – as perceived by the court of appeals in this case – has resulted in inconsistent outcomes within the Sixth Circuit in capital cases, and it has created a conflict between the Sixth Circuit and the other courts of appeals.

I. PRE-TRIAL and TRIAL EVENTS

> "From this record there is no question but that appellant or one Ronnie McCoy murdered her." *State v. Johnson*, 743 S.W.2d 154, 155 (Tenn. 1987).

On August 14, 1984, the State of Tennessee indicted Ronnie McCoy for burglary and other crimes. Leslie Fatowe, of the law firm SCHLEDWITZ, CROW, BELIES, BEARMAN, BUTLER & WASHINGTON undertook McCoy's representation. Ms. Fatowe worked out a deal for McCoy. On November 11, 1984, in exchange for McCoy's guilty plea, the State placed McCoy on work release from the Shelby County Penal Farm.

On December 9, 1984, Petitioner Donnie Johnson's wife, Connie Johnson, was found dead. She was last seen the night before with Johnson and McCoy.

Despite the fact that Johnson's murder trial was likely to be a finger-pointing contest between Johnson and McCoy, and despite the reality that implicating McCoy in Connie Johnson's murder would endanger the work release status that Fatowe had secured for McCoy, Fatowe and other members of her law firm undertook Donnie Johnson's representation.

Johnson was indicted by the State of Tennessee on one charge of first-degree murder in the Circuit Court for Shelby County, Tennessee.

At the guilt stage of Johnson's trial, McCoy testified that Donnie Johnson killed his wife, and McCoy testified that he had made no deal with the State for his testimony. At closing argument, the State's prosecutor told the jury that he believed McCoy's testimony, and that he knew of no reason why McCoy would lie. The jury convicted Donnie Johnson of first-degree murder.

Johnson's defense attorney's preparation for the sentencing stage of the trial consisted, *in toto*, of reviewing Tennessee's first-degree murder statute in the courtroom on the morning that the trial began and talking briefly with a few of Johnson's family members and acquaintances.

Counsel's lack of preparation showed. He conducted the sentencing phase "off the cuff," telling Johnson, "You don't have anything to lose now, you might as well get up there and

testify," placing Johnson on the stand without any preparation.

Johnson testified that McCoy killed his wife and that he had refrained from turning McCoy in because he was afraid of what McCoy would do to him. The only other evidence trial counsel introduced in mitigation was the testimony of a Baptist minister, who, contradictorily, told the jury that he had discussed God with Donnie Johnson and that Johnson believed that he would be accountable to God for his conduct. That testimony covers less than three trial-transcript pages.

The jury found two aggravating circumstances: 1) Johnson had a prior felony conviction; and 2) the murder was "heinous, atrocious, or cruel." The jury sentenced Johnson to death.

Two and a half years after Johnson's trial, McCoy acknowledged that, contrary to his trial testimony and the prosecutor's vouching for his credibility, the State had granted immunity for his trial testimony.

II. STATE POST-CONVICTION PROCEEDINGS

In State post-conviction proceedings, Johnson asserted, among other issues, that his trial counsel had rendered ineffective assistance under the Sixth Amendment at the sentencing stage of his trial. At his post-conviction hearing, Johnson introduced the testimony of two witnesses, Jeff Blum and Christine Glenn, whom the post-conviction court certified as experts in capital mitigation defense. Blum and Glenn testified at length regarding the ordinary standard of care in Tennessee for mitigation investigation in preparation for a capital trial at the time of Johnson's murder trial.

The post-conviction court denied Johnson's request for relief, and Tennessee's appellate courts ultimately affirmed that decision.

III. FEDERAL HABEAS PROCEEDINGS

Johnson filed his first and only federal petition for writ of habeas corpus in the United States District Court for the Western District of Tennessee. The district court possessed jurisdiction pursuant to 28 U.S.C. § 2241. After completion of the record pursuant to the Rules Governing Habeas Corpus Cases under Section 2254, the district court concluded that Johnson's attorneys had failed to meet the objective standard of reasonableness required of attorneys in Tennessee at the time of his trial. (Order, R. 84; App., *infra*, 144a). The district court, however, denied Johnson's habeas petition because the court was of the opinion that Johnson's attorneys' errors would not have changed the outcome of his trial. (*Id.*, *infra* 149a). The district court thereupon granted Johnson a certificate of appealability, *cf.* 28 U.S.C. § 2253(c), on his Sixth Amendment claim (*id.*; App., *infra*, 152a.), and Johnson filed a timely notice of appeal. The court of appeals possessed jurisdiction pursuant to 28 U.S.C. § 2253(a).

Johnson requested that the United States Court of Appeals for the Sixth Circuit expand the certificate of appealability to include the following issues: (1) whether the district court erroneously denied Johnson discovery request on his claim that his trial attorneys represented him while under an actual conflict of interest; (2) whether the district court erroneously denied relief on Johnson's claim that his trial attorneys rendered ineffective assistance at the guilt stage of the trial; (3) whether the district court erroneously denied relief on Johnson's claim that the State withheld evidence that it had struck a deal with McCoy while presenting false testimony that no such deal existed; (4) whether the district court erroneously denied relief on Johnson's claim that the State's prosecutor knowingly made false statements during closing arguments; and (5) whether the district court erroneously

denied relief on Johnson's objection to Tennessee's "heinous, atrocious, and cruel" statutory aggravating circumstance.

The court of appeals denied Johnson's motions to amend the certificate of appealability. On January 3, 2002, the Sixth Circuit case manager sent counsel a letter that read, in its entirety, "This letter will confirm that the court has denied your motion and supplemental motion to amend the certificate of appealability." (App., *infra*, 25a.) Johnson requested in good faith that the members of the court of appeals review, serially, this cursory denial, but that effort garnered a similar letter stating in its entirety, "This letter will confirm that the Court has denied your motion for consideration of an amendment to the certificate of appealability." (App., *infra*, 24a.)

On September 10, 2003, after briefing and argument on the Sixth Amendment issue certified for appeal by the district court, the court of appeals, in a 2-1 decision, rejected Johnson's appeal, affirming the district court's denial of his habeas petition. *Johnson v. Bell*, 344 F.3d 567 (6th Cir. 2003); App., *infra*, 3a.

In its decision, the court of appeals candidly initiated its analysis with the quandary that "the precise manner of [*Strickland v. Washington*'s] application continues to occupy the [United States Supreme] Court." *Johnson v. Bell*, 344 F.3d at 572. The court of appeals then cited *Wiggins v. Smith*, __ U.S. __, 123 S. Ct. 2527 (2003), and *Williams v. Taylor*, 529 U.S. 362 (2000), on the one hand, and *Bell v. Cone*, 535 U.S. 685 (2002), on the other, as contradictory decisions of this Court concerning the application of the *Strickland* standard to capital trials. *Id.* at 573.

The court of appeals, after admitting its own confusion over this Court's precedents, then relied on this Court's decision in *Bell v. Cone* to hold that Johnson's defense at sentencing had been sufficient for Sixth Amendment purposes. *Id.* The court of appeals reasoned that, because (according to

the court of appeals) this Court found the defense that Cone had received – where counsel had engaged in "a complete abdication of the attorney's role" and presented *no* mitigation evidence – to be constitutionally adequate, the court of appeals was obligated to find that Johnson's attorney had performed adequately in this case. *Id.* at 573-74.

Importantly, the court of appeals noted[1] that its decision to follow *Cone* conflicted with two other decisions of this Court, *Wiggins v. Smith* and *Williams v. Taylor*. *Johnson v. Bell*, 344 F.3d at 572. Of equal importance, the court of appeals recognized that "the present case contains elements similar to those of previous cases in which this court has been sufficiently troubled by allegations of effective assistance of counsel that we either granted the writ or remanded for an evidentiary hearing." *Id.* (specifically calling into question *Greer v. Mitchell*, 264 F.3d 663, 676-77 (6th Cir. 2001); *Mason v. Mitchell*, 320 F.3d 604, 624-26 (6th Cir. 2003); *Coleman v. Mitchell*, 268 F.3d 417, 450-52 (6th Cir. 2001); *Skaggs v. Parker*, 235 F.3d 261, 269-70 (6th Cir. 2001); *Austin v. Bell*, 126 F.3d 843, 848 (6th Cir. 1997); *Glenn v. Tate*, 71 F.3d 1204, 1206-08 (6th Cir. 1995)). The court of appeals nonetheless ultimately held against Johnson because the court was ". . . hard-pressed to reconcile *Cone* with a conclusion that counsel rendered constitutionally ineffective assistance of counsel . . .". *Id.*

By deciding to rely upon this Court's decision in *Bell v. Cone*, the court of appeals – by its own admission – failed to follow this Court's more recent decision in *Wiggins v. Smith*, as well as this Court's prior decision in *Williams v. Taylor*.

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[1] Through the use of a "but see" cite to *Wiggins* and *Williams*, the Court of Appeals used the most diplomatic method of noting its confusion with this Court's precedents that an inferior court can convey to a superior court. See *Johnson v. Bell*, 344 F.3d at 572.

See *Johnson v. Bell*, 344 F.3d at 572-73. Johnson petitioned for *en banc* review of the panel's decision, but his petition was denied on November 25, 2003. This petition for writ of certiorari followed.

REASONS FOR GRANTING THE PETITION

1. The Sixth Circuit's reliance on this Court's decision in *Bell v. Cone*, 535 U.S. 685 (2002), to the exclusion of this Court's decision in *Wiggins v. Smith*, __ U.S. __, 123 S. Ct. 2527 (2003), has resulted in a conflict between the Sixth Circuit and the other courts of appeals on an important question of constitutional law.

2. The Sixth Circuit used the patently wrong legal standard – requiring a "more likely than not" showing that counsel's errors would *not* have resulted in sentence of death – for determining prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984).

3. Donnie E. Johnson presented detailed motions to the Sixth Circuit requesting that the court amend the certificate of appealability that the district court had granted. The denial of Johnson's motions came in a one-sentence letter signed by a Sixth Circuit case manager. The letter offers no reasoning for the denial of Johnson's motions, and hence this Court cannot review the Sixth Circuit's action. This Court should grant the petition, vacate the decision below, and remand this case to the Sixth Circuit for an explanation of why it denied Johnson's motions to amend the certificate of appealability. *Cf.* Sup. Ct. R. 10 (a).

I. THE COURT OF APPEALS ERRONEOUSLY RELIED ON THIS COURT'S DECISION IN *BELL V. CONE*, TO THE EXPLICIT EXCLUSION OF THIS COURT'S MORE RECENT DECISION IN *WIGGINS V. SMITH*, IN REJECTING DONNIE JOHNSON'S HABEAS PETITION.

The district court below determined that Donnie Johnson's trial attorneys failed to meet the "objective standard of reasonableness" required by the Sixth Amendment, as established by this Court in *Strickland v. Washington*. (App., *infra*, 149a). In overturning that determination, the court of appeals relied on this Court's decision in *Bell v. Cone* to conclude that counsel's performance had been constitutionally adequate. In so holding, the court of appeals expressed its confusion over the applicable authority from this Court to follow, called into question a significant number of Sixth Circuit precedents, and issued a decision that is aberrant among the courts of appeals on this important issue.

A. The court of appeals used the wrong legal standard for evaluating trial counsel's performance at the sentencing stage of Donnie Johnson's capital murder trial.

The court of appeals based its conclusion that Donnie Johnson's trial counsel performed adequately for purposes of the Sixth Amendment on this Court's decision in *Bell v. Cone*. See *Johnson v. Bell*, 344 F.3d 573. By deciding to follow *Cone*, the court of appeals – by its own candid admission – failed to follow this Court's decision in *Wiggins v. Smith* and *Williams v. Taylor*. *Id.* In *Wiggins*, __ U.S. at __, 123 S. Ct. at 2536-37, however, this Court, citing the American Bar Association's Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, held that

defense counsel in capital cases must make a reasonable investigation, consistent with prevailing professional standards, of the defendant's past in order to professionally analyze potential mitigation evidence for the sentencing phase of the trial. *Cf.*, Note, "The Supreme Court, 2002 Term Leading Cases," 117 *Harv. L. Rev.* 278 (2003)("[T]he *Wiggins* Court held that counsel in capital cases have a constitutional obligation to investigate the personal history of their clients.").

As the district court concluded, and particularly in light of the testimony of Jeff Blum and Christine Glenn that Johnson presented at his State post-conviction hearing, it would be entirely implausible to argue that Johnson's attorneys met the prevailing professional norms for investigation of mitigation evidence in Tennessee at the time of Johnson's murder trial, as required by this Court in *Wiggins*. Even the State of Tennessee effectively conceded trial counsel's deficient performance in its briefs on appeal. Yet the court of appeals was "hard-pressed" by its reading of this Court's decision in *Cone* to rule for Johnson, resulting directly in the denial of Johnson's habeas petition. *Johnson v. Bell*, 344 F.3d at 373.

In choosing to follow this Court's decision in *Cone*, to the detriment of this Court's decision in *Wiggins*, the Sixth Circuit's decision is an aberration among the courts of appeals. Since this Court issued its decision in *Cone*, not a single one of the courts of appeals, besides the Sixth Circuit, has cited *Cone* as the legal basis for determining the adequacy of defense counsel's performance in the sentencing phase of a capital case. Since this Court decided *Wiggins*, however, which has been extant for a much shorter period of time than *Cone*, the other courts of appeals have published over 40 decisions that have specifically cited and followed the *Wiggins* standard for analyzing attorney investigations of potential mitigating circumstances in capital cases. E.g., *Rompilla v. Horn*, __ F.3d __, 2004 WL 66753 (3d Cir. January 13,

2004); *Wilson v. Ozmint*, 352 F.3d 847 (4th Cir. 2003); *Lewis v. Dretke*, __ F.3d __, 2003 WL 22998819 (5th Cir. December 23, 2003); *Blackwell v. Graves*, 349 F.3d 529 (8th Cir. 2003); *Nunes v. Mueller*, 350 F.3d 1045 (9th Cir. 2003); *Paine v. Massie*, 339 F.3d 1194 (10th Cir. 2003); *Davis v. Secretary for Dept. of Corrections*, 341 F.3d 1310 (11th Cir. 2003).[2]

Because the court of appeals was openly confused about which decision of this Court to follow in deciding Johnson's habeas appeal, and because the Sixth Circuit's reliance on *Cone* is an aberration among the courts of appeals, this Court should grant Johnson's petition for a writ of certiorari.

B. The decision of the court of appeals is flawed beyond simply 'the misapplication of [a] properly state rule of law" of this Court.

Sup. Ct. R. 10(c) specifically contemplates certiorari review of a court of appeals' decision that "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Rule 10 also provides, however, "A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." The court of appeals' decision in this case is not merely a misapplication of *Cone* or *Wiggins*. The court of appeals' candid rejection of *Wiggins* as the applicable controlling authority from this Court, and its explicit contrary adherence to *Cone*, is the fundamental basis for this petition.

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[2] The lack of decisions by the First Circuit, Second Circuit, Seventh Circuit, and District of Columbia Circuit since *Wiggins* most likely reflects the paucity of habeas death-penalty cases arising in those circuits.

C. The court of appeals is unable, and is likely to continue to be unable, to remedy its confusion over the proper authority to follow when deciding Sixth Amendment capital cases.

Since this Court issued its decision in *Wiggins*, the Sixth Circuit's precedents examining the effectiveness of counsel at capital sentencing proceedings under the Sixth Amendment have been markedly inconsistent and divisive. Almost simultaneously with the court's 2-1 decision in *Johnson v. Bell*, a 2-1 panel of the Sixth Circuit decided *Frazier v. Huffman*, 343 F.3d 780, *amended on other grounds*, 348 F.3d 174 (6th Cir. 2003). In that case, the court determined that defense counsel's failure to investigate defendant's head injury prior to the sentencing phase of his trial constituted ineffective assistance. *Id.* at 797. In so holding, the court explicitly followed *Wiggins*, and it specifically rejected the applicability of *Cone* to circumstances that are strikingly similar to this case. *Id.* at 796-97.

More recently, a 2-1 panel of the Sixth Circuit decided *Hamblin v. Mitchell*, 2003 WL 23024784 (6th Cir. December 29, 2003)(publication pending). In that case, the panel determined that defense counsel's failure to investigate the defendant's family history and psychological background constituted ineffective assistance of counsel. *Id.* at *5. In reaching this conclusion, the panel in *Hamblin* specifically followed this Court's decision in *Wiggins* ("Thus, the *Wiggins* case now stands for the proposition that the ABA standards for counsel in death penalty cases provide the guiding rules and standards to be used in defining the 'prevailing professional norms' in ineffective assistance cases." *Id.* at *2.), yet the panel did not even cite *Bell v. Cone*.

To date, the Sixth Circuit has rejected all requests for *en banc* review of these panel decisions. Moreover, although the Sixth Circuit's acrimony over death-penalty appeals has

received significant national public attention, e.g., Adam Liptak, "Judge Calls Vote on Execution Improper," *The New York Times*, January 15, 2004; "Sixth Circuitry," *The Wall Street Journal*, May 17, 2002 (editorial); "Turmoil in the Courts," *The Cincinnati Post*, October 12, 2001 (editorial), the Sixth Circuit's institutional difficulty with handling death-penalty appeals has persisted. *See In re Byrd*, 269 F.3d 578, 582 (6th Cir. 2001)(Boggs, J., dissenting from the stay of execution)("The truth may be that for *this* prisoner, a majority of the active members of *this* court would grant a stay based on a hot dog menu."). *See also, Williams v. Taft*, Sixth Cir. No. 04-3044 (6th Cir. January 15, 2004)(order denying a stay of execution)(Clay, J., dissenting)("I dissent from the order . . . because the vote was illegal under 28 U.S.C. § 46(c). . . . [T]his unlawful denial of the motion to stay has eviscerated the results of the poll of the active judges [to hear the case *en banc*].").

Unfortunately, the Sixth Circuit's internal division regarding the application of the *Strickland* standard to capital sentencing proceedings explains why its unique (though inconsistent) reliance on *Cone* differs so dramatically from the other courts of appeals. By openly positing that this Court's decision in *Wiggins* conflicts with *Cone*, the panel below has made *en banc* resolution of the Sixth Circuit's internal split in capital cases virtually impossible. The *en banc* Sixth Circuit, for institutional reasons, simply cannot decide with finality whether this Court in *Wiggins* altered its prior decision in *Cone*. Because of this inability, the Sixth Circuit's periodic reliance on *Cone*, to the detriment of *Wiggins*, remains an aberration among the courts of appeals, and the only viable alternative to the current confusion within the Sixth Circuit is certiorari review by this Court.

II. THE COURT OF APPEALS USED THE INCORRECT "PREJUDICE" STANDARD FOR EVALUATING THE EFFECT OF TRIAL COUNSEL'S INADEQUATE PERFORMANCE ON THE JURY'S DELIBERATIONS.

After concluding that trial counsel had performed adequately under the Sixth Amendment, the court of appeals determined, in the alternative, that any mistakes made by counsel did not prejudice Johnson under the second prong of the *Strickland* standard. The court of appeals reasoned that it could not determine that the testimony Johnson presented during the State post-conviction hearing (consisting of eight mitigation witnesses) "would likely have led to a different result." *Johnson v. Bell*, 344 F.3d at 574.

By using this "likely" standard for determining prejudice, the court of appeals directly contradicted the standard for prejudice established by this Court in *Strickland v. Washington*. In that case, this Court specifically held that, to prove prejudice, a defendant "need *not* show that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland*, 466 U.S. at 693 (emphasis added). Yet the "more likely than not" standard is exactly the "likely" legal standard that the court of appeals used in this case. See *Johnson v. Bell*, 344 F.3d at 574.

Not surprisingly, the Sixth Circuit's invocation of a prejudice standard that conflicts with the standard established by this Court in *Strickland* has produced a straightforward circuit split. The Second and Tenth Circuits clearly hold that the "reasonable probability" standard of Strickland is appreciably less stringent than a "preponderance" standard, which is equivalent to a "likely" standard of prejudice. See *Purdy v. Zeldes*, 337 F.3d 253, 260 (2d Cir. 2003)(the prejudice standard under *Strickland* is "lower than the preponderance standard"); *Fisher v. Gibson*, 282 F.3d 1283, 1307 (10th Cir. 2002)("The prejudice defendant must show is

by less than a preponderance of the evidence . . . ."). *See also*, *Brodit v. Cambra*, 350 F.3d 985, 1006 (9th Cir. 2003)(Berzon, J., dissenting)("prejudice" under *Stickland* requires "a fairly low threshold" that is significantly lower than the "more likely than not" standard). The Eleventh Circuit, however, has joined the Sixth Circuit in holding that an attorney's deficient performance must "likely" have affected the outcome of the trial before there can be a Sixth Amendment violation. *Cf.*, *Parker v. Secretary for the Dep't of Corr.*, 350 F.3d 764, 785 (11th Cir. 2003)(affirming "likely" standard of prejudice used by the State court).

Because the court of appeals below used a patently wrong legal standard for determining prejudice under *Strickland v. Washington*, and because the courts of appeals are squarely in conflict regarding the probability necessary for determining prejudice under *Strickland*, this Court should grant Johnson's petition for writ of certiorari.

III. WHEN REVIEWING A COURT OF APPEALS' DENIAL OF A CERTIFICATE OF APPEALABILITY, THIS COURT MUST BE ABLE TO DETERMINE THE BASIS OF THE LOWER COURT'S DECISION.

In myriad contexts, including the resolution of matters in habeas proceedings, appellate courts recognize that when a lower court disposes of a matter it must offer an explanation for its action, otherwise the matter cannot be subject to review. Reviewing courts have therefore vacated and remanded for a statement of reasons unexplained decisions involving:

(1) habeas proceedings (*Gandarilla v. Artuz*, 322 F.3d 182, 184 (2d Cir. 2003)("[W]e remand to the district court for clarification because the record before us does not disclose

the basis on which the district court denied Gandarilla's petition"); *Miranda v. Bennett*, 322 F.3d 171, 175 (2d Cir. 2003)("[W]e, like other appellate courts, remand to the district court when the record is insufficiently clear to permit us to determine the basis for the district court's decision"); *Whitley v. Miller*, 749 F.2d 634, 635 (11th Cir. 1984)("The findings of the district court are insufficient to enable us to reach the merits on this appeal .... Accordingly, we reverse and remand for ... findings of fact and conclusions of law ...."); *see also Sumner v. Mata*, 449 U.S. 539, 552 (1981)("No court reviewing the grant of an application for habeas corpus should be left to guess as to the habeas court's reasons for granting relief"); *Miranda v. Bennett*, 322 F.3d at 176 (citing cases where circuit courts seek clarification from the district court in the context of appeals from orders granting or denying petitions for habeas corpus));

(2) summary judgment (*Beckford v. Portuondo*, 234 F.3d 128, 130 (2d Cir. 2000)("The district court's decision then, is simply too spare to serve as a basis for our review ... We therefore remand the case to the district court for further consideration and a complete and comprehensive decision"); *Atkinson v. Jory*, 292 F.2d 169, 171 (10th Cir. 1961)("The motion for summary judgment and the order of the court are silent as to what facts form the background of the judgment and are equally silent as to legal grounds .... [W]e are unwilling to sustain a summary judgment where the record is unclear to us on both fact and the legal theory forming the basis of the ruling"));

(3) personal jurisdiction (*Fort Knox Music, Inc. v. Baptiste*, 203 F.3d 193, 197 (2d Cir. 2000)("Because the absence of an explanation prevents meaningful appellate review, we remand the matter to the district court for supplementation of the record with a statement of the factual and doctrinal grounds for the court's ruling on personal jurisdiction"));

(4) awards of attorney's fees (*Orchano v. Advanced Recovery, Inc.*, 107 F.3d 94, 99 (2d Cir. 1997)("The court must inform the reviewing court as to how the standard has been applied to the facts as the court has found them. If the court fails to make findings and give an explanation, and the reason for the court's ruling is not clear to us, we will remand for findings and an explanation"); *Joseph A. v. New Mexico Department of Human Services*, 28 F.3d 1056, 1061 (10th Cir. 1994)("Unless district courts are specific in their reasons for awarding attorneys' fees, we have no adequate basis upon which to review such awards"); *Fitzpatrick v. I.R.S.*, 665 F.2d 327, 332 (11th Cir. 1982)("An adequate explanation of the fee award is absolutely essential to appellate review; without it, review is impossible because no basis exists to judge the trial court's exercise of discretion));

(5) the denial of motions to vacate a default judgment (*Enron Oil Corp. v. Diakuhara*, 10 F.3d 90, 96 (2d Cir. 1993)("[T]he importance of an explanation by the district court for its denial of a motion to vacate ... is self-evident. The absence of an explanation defeats intelligent appellate review"); *Davis v. Musler*, 713 F.2d 907, 913 (2d Cir. 1983)("[T]he order appealed from does not reveal the standards that the district judge applied in denying the motion, or the factors that he considered determinative. Indeed, the order does not even mention several of the arguments pressed by defendants"));

(6) criminal sentencing (*United States v. Okane*, 52 F.3d 828, 837 (10th Cir. 1995)("Given our inability to review the district court's degree of departure in this case, a remand for resentencing is necessary"); *United States v. Zackson*, 6 F.3d 911, 923 (2d Cir. 1993)("Zackson's claim of abuse of discretion cannot be properly reviewed without some statement in the record which reveals the justification for the imposition of the particular sentence"));

(7) the entry of preliminary injunctions (*Davis v. Hernandez*, 166 F.3d 432, 437 (2d Cir. 1999)("Because we are unable to discern the relevant matters from the record, we are unable to make a reasoned determination of whether (the District Court's) finding ... was 'clearly erroneous.' We therefore remand for proceedings consistent with this opinion"); *Weitzman v. Stein*, 897 F.2d 653, 658 (2d Cir. 1990)("[W]e will vacate the order if the findings and the record are insufficient to enable us to be sure of the basis of the decision"); *Badgley v. Santacroce*, 815 F.2d 888, 889 (2d Cir. 1987)("[W]e vacate the order because the district court failed to set forth findings of fact and conclusions of law sufficient to permit appellate review")); and

(8) the award of damages in tort actions (*Fuchstadt v. United States*, 434 F.2d 367, 370 (2d Cir. 1970)(Without an explanation for the district court's damage award, "the defendant is unable properly to exercise the appellate rights conferred by statute and the court is equally unable to make appropriate appellate review")).

As discussed below, this unremarkable rule of remanding to a lower court for an explanation of its actions is applicable to a lower court's action disposing of a certificate of appealability ("COA"). This basic requirement takes on added significance, when, as here, the petitioner makes a detailed COA request to the circuit court, the claims involved implicate the fundamental fairness of a petitioner's death sentence, and those claims will not garner any federal review if the circuit court's denial is its unreviewable.

A. A court reviewing a lower court's denial of a certificate of appealability must be able to determine the basis of the lower court's denial.

When a lower court fails to express its reasoning when resolving a dispute brought before it, appellate review of the lower court's action is difficult, if not impossible. In *Miranda v. Bennett*, 322 F.3d 171 (2d Cir. 2003), the Second Circuit expressly recognized this reality in the context of a COA request. In that case, the petitioner presented the district court with a habeas petition asserting, among other things, claims of prosecutorial misconduct and denial of self-representation. The district court issued an order stating it was denying the petition for the reasons set out in the State's memorandum of law and in the State court decision affirming the denial of post-conviction relief.

The Second Circuit held that remand to the district court is required when the record is insufficiently clear to ascertain the basis for the district court's decision. *Miranda v. Bennett*, 322 F.3d at 175. It noted that, while the district court offered as its reasoning the reasoning of the State appellate court and the respondent's memorandum of law, those documents provided multiple, and at times conflicting, rationales. The court stated,

> the district court's adoption of the decision of (the State appellate court) and the arguments of the State ... leaves ambiguities that impede meaningful appellate review and a reasoned determination of whether those claims meet the requirements for the issuance of a certificate of appealability.

Miranda v. Bennett, 322 F.3d at 178.

As *Miranda* recognizes, a lower court's failure to provide a basis for its decision respecting a COA request makes review of its decision difficult, if not impossible. Given this reality, courts of appeals routinely explain their reasons when deciding a COA request. *See United States v. Zuno-Arce*, 339 F.3d 886, 888-93 (9th Cir. 2003)(explaining why circuit court was granting in part, denying in part, COA request); *Shabazz v. Artuz*, 336 F.3d 154, 160 (2d Cir. 2003)(explaining that circuit court was denying COA request due to failure of the petitioner to raise the issue in the district court); *Walton v. Angelone*, 321 F.3d 442, 452-467 (4th Cir. 2003)(explaining that circuit court was denying COA request because it believed the evidence was insufficient to establish the claim for relief); *Cage v. McCaughtry*, 305 F.3d 625, 626-27 (7th Cir. 2002)(explaining that the circuit court's previous granting of a COA request was erroneous and why it was amending the COA to include another claim for relief); *Palmer v. United States*, 46 Fed. Appx. 5 (1st Cir. 2002)(explaining why the circuit court was denying the movant's request that it expand the COA granted by the district court); *United States v. Philips*, 2002 U.S. App. Lexis 23750 (D.C. Cir. 2002)(explaining why the circuit court was denying the movant's COA request); *United States v. Ellick*, 3 Fed. Appx. 870 (10th Cir. 2001)(explaining that circuit court was denying the COA request due to failure of the movant to object timely to the magistrate's report and recommendation); *Jones v. United States*, 224 F.3d 1251, 1254-60 (11th Cir. 2000)(explaining why the circuit court was granting the movant's motion to expand the COA granted by the district court); *United States v. Thomas*, 221 F.3d 430, 437-38 (3d Cir. 2000) (explaining why the circuit court was expanding the COA granted by the district court); *Alexander v. Johnson*, 211 F.3d 895, 896-98 (5th Cir. 2000)(explaining why the circuit court was denying the petitioner's COA request).

This Court's recent decision in *Miller-El v. Cockrell*, 537 U.S. 322 (2003), demonstrates why providing such an explanation is crucial to the appellate process.

In *Miller-El v. Johnson*, 261 F.3d 445 (5th Cir. 2001), the Fifth Circuit denied the petitioner a COA on, among other things, his claim that the State's use of peremptory challenges against African-American prospective jurors resulted from purposeful discrimination. In explaining why it was denying the COA, the Fifth Circuit stated that it had taken into consideration the requirement that federal courts presume state court findings of fact correct. *See* 28 U.S.C. § 2254 (d)(2) & (e)(1). It concluded that the State court fact-findings were not unreasonable, and therefore the State court's adjudication of Miller-El's discrimination claim neither resulted in a decision that was unreasonable in light of the evidence presented nor resulted in a decision that was contrary to clearly established federal law. *Miller-El v. Johnson*, 261 F.3d at 451-52.

Given that the Fifth Circuit fully explained its reasoning, this Court was in a position to review the case and ascertain that the circuit court's decision denying a COA on the discrimination claim was erroneous. On certiorari review, this Court reasoned that the standard for granting a COA is whether jurists of reason could disagree with the lowers court's resolution of the claim. *Miller-El v. Cockrell*, 537 U.S. at 327. Because the Fifth Circuit interjected the requirements of 28 U.S.C. § 2254(d)(2) & (e)(1) into its COA determination, this Court held that the Fifth Circuit reviewed the petitioner's COA request under "too demanding a standard." *Id.*, 537 U.S. at 341-42. This Court therefore reversed the Fifth Circuit's denial of the petitioner's COA request on his discrimination claim. *Id.*, 537 U.S. at 348.

In *Miller-El*, this Court was able to perform its role in the appellate process only because the Fifth Circuit explained its reasons for denying the COA. This Court could not have

performed its appellate function had the Fifth Circuit simply stated "denied." Yet that is precisely what happened in the Sixth Circuit in Johnson's case.

B. The Sixth Circuit's unexplained denial of Johnson's COA request precludes adequate review by this Court.

Johnson's request to the Sixth Circuit to amend the certificate of appealability specifically identified claims that he believed were debatable by reasonable jurists. Johnson supported his COA request with more than one hundred legal citations and more than eighty factual citations to record. Given that this is a death-penalty proceeding, and given that Johnson's claims would not be reviewed on appeal absent action from the Sixth Circuit or this Court on review of the Sixth Circuit's decision, Johnson was entitled to receive some reasoned analysis of his COA request. The Sixth Circuit, however, did not even enter an order. It sent Johnson a one-sentence *letter, signed by the case manager*. And when Johnson requested that the entire court consider the propriety of that initial denial, he again received a one-sentence denial signed by the case manager.

The Sixth Circuit letters offer no hint of the reasoning the court employed to conclude that Johnson was not entitled to have the COA granted by the district court expanded to include the additional issues he presented in his COA request. Thus, "the record is insufficiently clear to permit [this Court] to determine the basis for the [Sixth Circuit's] decision," *Miranda v. Bennett*, 322 F.3d at 175; the Sixth Circuit's disposition of Mr. Johnson's COA request "is simply too spare to serve as a basis for [this Court's] review," *Beckford v. Portuondo*, 234 F.3d at 130; "the absence of an explanation prevents meaningful appellate review," *Fort Knox Music, Inc. v. Baptiste*, 203 F.3d at 197; "review is

impossible because no basis exists to judge the [Sixth Circuit's decision]," *Fitzpatrick v. I.R.S.*, 665 F.2d at 332; "The absence of an explanation defeats intelligent appellate review," *Enron Oil Corp. v. Diakuhara*, 10 F.3d at 96; the Sixth Circuit's action "cannot be properly reviewed," *United States v. Zackson*, 6 F.3d 911, 923 (2d Cir. 1993); the Sixth Circuit "failed to set forth (reasoning) sufficient to permit appellate review," *Badgley v. Santacroce*, 815 F.2d at 889; and Johnson "is unable properly to exercise the appellate rights conferred by statute and [this Court] is equally unable to make appropriate appellate review." *Fuchstadt v. United States*, 434 F.2d at 370.

As in the many cases cited above, the Sixth Circuit's terse denial prevents this Court from being able to review the lawfulness of the court of appeals' decision. This Court should therefore grant Johnson's petition for writ of certiorari and vacate the Sixth Circuit's denial of Johnson's COA request, remanding this case for a statement of the reasons why it denied that request. Only then can Johnson exercise the appellate rights to which he is entitled under this Court's decision in *Miller-El*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

C. Mark Pickrell
Counsel of Record
3200 West End Avenue
Suite 500
P.O. Box 50478
Nashville, Tennessee 37205-0478
(615) 356-4978

Christopher M. Minton
Office of the Federal Public Defender
810 Broadway
Suite 200
Nashville, Tennessee 37203
(615) 736-5047

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No.: 01-5451

[Filed Nov. 25, 2003]

DONNIE E. JOHNSON,)
Petitioner-Appellant,)
)
v.)
)
RICKY BELL,)
Respondent-Appellee.)
)

JUDGES: BEFORE: BOGGS, Chief Judge; NORRIS and CLAY, Circuit Judges.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active* judges of this court, and no judge of this court having requested a vote

* Judge Gibbons recused herself from participation in this ruling.

on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Clay would grant rehearing for the reasons stated in his dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 01-5451

[Filed Sept. 10, 2003]

Donnie E. Johnson, Petitioner-Appellant,

v.

Ricky Bell, Respondent-Appellee.

Appeal from the United States District Court for the Western District of Tennessee at Memphis

Before: BOGGS, NORRIS, and CLAY, Circuit Judges.

OPINION

ALAN E. NORRIS, Circuit Judge.

Donnie E. Johnson, a prisoner on death row in Tennessee, appeals from the denial of his petition for a writ of habeas corpus. 28 U.S.C. § 2254. The sole issue on appeal concerns the performance of defense counsel during the sentencing phase of the trial, which petitioner contends amounted to

constitutionally ineffective assistance. The district court declined to issue the writ on this ground because it concluded that counsel satisfied the Sixth Amendment standards governing the right to effective representation as defined by *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). We now affirm that judgment.

I.

Because the scope of this appeal is limited, the underlying facts that gave rise to petitioner's prosecution, while tragic, are not germane to our discussion. They are set forth at some length in the opinion of the Supreme Court of Tennessee affirming petitioner's conviction and sentence on direct appeal. *State v. Johnson*, 743 S.W.2d 154 (Tenn. 1987), *cert. denied*, 485 U.S. 994 (1988). Suffice it to say that petitioner brutally murdered his wife, Connie Johnson, on December 8, 1984, at the camping equipment center where he worked. With the help of a co-worker, he then disposed of her body and rather ineffectively set about covering up his crime.

During his trial, petitioner was represented by retained counsel Jeff Crow and Clark Washington. Washington's background was primarily in civil practice. Crow testified in state post-conviction proceedings that he had conducted five or six criminal trials before this one but could not remember whether the one murder trial he had second-chaired had been a death-penalty case. The sentencing phase of the trial took place over October 3 and 4, 1985. The jury found both the aggravating circumstances presented to it: 1) Johnson had previously been convicted of one or more felonies that involved the use of threat or violence; 2) the murder was especially heinous, atrocious, and cruel in that it involved torture or depravity of the mind. Although he did not testify during the guilt phase of his trial, petitioner elected to take the

stand during his sentencing hearing. He denied that he killed his wife and attempted to shift the blame to his co-worker, who was on work release from prison at the time of the murder. *Johnson*, 743 S.W.2d at 156. He conceded, however, that he assisted in the disposal of his wife's corpse.

Defense counsel called only one other witness in mitigation, Robert G. Lee, a minister who had counseled Johnson and his family while he was in jail. The minister testified that Johnson had told him that "his faith in God was what was sustaining him through this ordeal. He also expressed to me that he knew that ultimately one day he would have to give an accounting of his life to God."

As mentioned, the jury returned a sentence of death. After exhausting his direct appeals, petitioner initiated a post-conviction action in the Criminal Court of Shelby County, Tennessee, alleging for the first time that he received ineffective assistance during the sentencing phase of his trial because his attorneys failed adequately to investigate or otherwise develop mitigating evidence. The court held an evidentiary hearing, which included the testimony of petitioner, certain of his family members, trial counsel, and experts on the topic of proper practices in preparing for sentencing proceedings in a capital case.

Ruby Johnson, petitioner's mother, testified that she spoke with attorney Washington once about her son's case and that "he talked very little about it to me." She met attorney Crow only on the day of trial. According to Mrs. Johnson, she was not asked about her son's background or marriage even though he and his wife had lived next door to her since their marriage. She did not know of any problems between her son and his wife. Rather, she believed him to be a hard worker

who cared for his family and raised well-mannered children. Despite this information, she was not asked to testify.

James Johnson, petitioner's father, contended that petitioner "was one of the most devoted persons to his family that I have ever seen," and that he was a good son, a hard worker, and a good family man. Mr. Johnson went on to assert that trial counsel asked him very little about his son's boyhood and schooling. Concerning the fact that he did not testify at trial, petitioner's father indicated that he had been willing to do so but had been advised by counsel that it would be unwise. Petitioner's brother, James C. Johnson, Jr., continued with this theme, stating that trial counsel did not ask him about his brother's background other than an earlier arrest in Ohio. Had he testified, James Johnson would have asserted that he had spent a significant amount of time with petitioner and his family and that "there was never an altercation of any kind that I remember other than fun and laughter." Like his father, James Johnson stated that he was available to testify on behalf of his brother, but trial counsel "said it would be advisable not to."

Petitioner's sister, Shirley Ward, testified that trial counsel never contacted her. She stated that petitioner was a good family man who did not have any problems at home. On cross examination, she admitted that she knew nothing of petitioner's alleged or admitted extramarital relationships.

Mary Ward, petitioner's other sister, testified that she told trial counsel that she was available to testify at trial but was never contacted by counsel. She, too, indicated that she had been with the deceased "numerous times and they had a very happy marriage." On cross examination she stated, "All I know is that Donnie loved Connie, and he would not have killed her. And they had a happy marriage." She did not

know anything about the alleged problems in petitioner's marriage.

In addition to these five family members, three other potential character witnesses testified at the hearing. A childhood friend, Barry Gray, stated that he had known petitioner to be a good friend, hard worker, and a caring family man. James Ingram, petitioner's jailer pending trial, mentioned that petitioner had caused no trouble while incarcerated and had a clean disciplinary record. And, finally, David Force, petitioner's employer, asserted that petitioner had been a good employee.

The post-conviction hearing contained contradictory testimony concerning the extent to which trial counsel contacted family members, evaluated their potential testimony, and considered asking them to testify during the sentencing phase of the proceedings. While the family members recall some fleeting contact, they uniformly contend that they were discouraged from testifying. Their position, however, is somewhat at odds with the memory of trial counsel. Jeff Crow, lead trial counsel, testified that family members indicated to him that they did not want to take the stand. According to him, "As I remember, we talked to the family. We talked to the minister. We talked to Johnson. And we decided after doing all that to handle the sentencing hearing in the manner in which it was done." Petitioner's co-counsel, Clark Washington, corroborated Crow's testimony that family members were reluctant to appear at trial. "All of them wanted to help Don Johnson," Washington testified, "but they were concerned or afraid or not wanting to really come in under the spotlight in a courtroom and take a witness chair."

The record suggests that Crow and Washington were diligent in preparing for the guilt phase of the trial but gave scant attention to the sentencing phase until the verdict was returned. In fact, Crow testified that his main preparation for sentencing was to review the Tennessee code on death-penalty procedure while the guilt portion of the trial was under way.

On August 2, 1989, the Tennessee trial court issued an order denying post-conviction relief. The court accepted trial counsel's testimony that family members "could not or would not get involved in testifying." Any testimony from them "that [petitioner] was a good worker and had a good marriage" would have opened the door to rebuttal evidence of strains in his marriage, the court concluded. The court indicated that family members' testimony would not have been enough to overcome the jury's apparent rejection of petitioner's direct testimony and the "devastating" cross examination that followed. Citing *Strickland, supra,* the court found "nothing in the evidentiary hearing to suggest that there was any failure of counsel to meet the standards of competence required in criminal cases or that any action or inaction on their part prejudiced the case of their client."

Petitioner appealed to the Tennessee Court of Criminal Appeals, which affirmed the trial court's judgment. *Johnson v. State*, 1991 Tenn. Crim. App. LEXIS 520, No. 61, 1991 WL 111130 (Tenn. Crim. App. June 26, 1991) (No. 61). The court reasoned as follows:

> At the post-conviction hearing, members of the appellant's family testified they wished to testify at the convicting trial but were not called to do so.
>
> These witnesses testified they would have told the jury the appellant was a hard worker who loved his family.

> The major flaw in this was the fact the appellant was convicted of murdering his wife.
>
> We conclude this evidence would not have benefitted the appellant, and the failure of the trial lawyer to call these witnesses during the penalty phase of the trial gives no right to a new trial.

1991 Tenn. Crim. App. LEXIS 520, 1991 WL 111130 at *1-2. (citation omitted). The Supreme Court of Tennessee declined to review this decision. Thereafter, petitioner initiated another, ultimately unsuccessful post-conviction challenge that is not relevant to the sole issue before us.

After exhausting his state-court avenues of redress, petitioner filed the instant habeas corpus petition on November 14, 1997, raising twenty grounds for relief. The district court denied the petition. *Johnson v. Bell*, No. 97-3052-DO (W.D. Tenn. Feb. 28, 2001). However, the district court issued a certificate of appealability pursuant to 28 U.S.C. § 2253(c) on the sole issue of whether petitioner received ineffective assistance of counsel at the sentencing phase of his trial due to the failure to investigate and present mitigating evidence.

II.

We review de novo the legal conclusions of a district court in a habeas proceeding. *Mitzel v. Tate*, 267 F.3d 524, 530 (6th Cir. 2001). Because Johnson filed his habeas petition on November 14, 1997, after the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") became effective, this court's review of state court conclusions is governed by AEDPA. *Id.* Under AEDPA's provisions, we may not grant

a writ of habeas corpus for any claim that was adjudicated on the merits in state court unless the adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in a state court proceeding.

28 U.S.C. § 2254(d). In addition, the findings of fact made by a state court are presumed to be correct and can be contravened only if the habeas petitioner can show by clear and convincing evidence that the state court's factual findings were erroneous. 28 U.S.C. § 2254(e)(1).

In *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000), the Court interpreted 28 U.S.C. § 2254(d)(1) as requiring a distinction between decisions that are "contrary to" and those that involve an "unreasonable application of" clearly established Supreme Court precedent. *Id.* at 405. A state court decision is "contrary to" Supreme Court precedent "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law," or "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours." *Id.* A state court decision is also "contrary to" Supreme Court precedent if the state court "applies a rule that contradicts the governing law set forth" in that precedent. *Id.*

A state court decision involves an "unreasonable application" of clearly established Supreme Court precedent

"if the state court identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular state prisoner's case." *Id.* at 407.

III.

With these precepts in mind, we turn to the legal issue before us. At this point, the two-part test used to determine whether a criminal defendant was denied effective assistance of counsel is extremely familiar, even if the precise manner of its application continues to occupy the Court. *Compare Wiggins v. Smith*, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003), and *Williams v. Taylor, supra,* with *Bell v. Cone*, 535 U.S. 685, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002). As the Court put it nearly twenty years ago:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also Mason v. Mitchell*, 320 F.3d 604, 616 (6th Cir. 2003); *Greer v. Mitchell*, 264 F.3d 663, 673-74 (6th Cir. 2001).

In assessing counsel's performance, we inquire whether "counsel's representation fell below an objective standard of reasonableness," as measured by prevailing professional norms. *Rickman v. Bell*, 131 F.3d 1150, 1154 (6th Cir. 1997) (*quoting Strickland*, 466 U.S. at 688). This objective reasonableness standard encompasses strategic litigation choices that simply fail to bear fruit. *See Strickland*, 466 U.S. at 689. To establish prejudice, moreover, a defendant must demonstrate a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

In evaluating petitioner's claim, we are mindful of the Supreme Court's opinion in *Bell v. Cone*, 243 F.3d 961, which reversed a grant of the writ by this court. *See Cone v. Bell*, 243 F.3d 961 (6th Cir. 2001). In *Cone*, we observed that counsel's presentation during the sentencing phase was a complete abdication of the attorney's role. During the guilt phase, counsel had presented evidence of his client's social history and mental state in an attempt to raise a defense of insanity. In the sentencing phase, however, counsel presented no mitigating evidence at all, made no final argument, and did not even ask the jury to spare his client's life. *Cone*, 243 F.3d at 978. The Supreme Court reversed and, in doing so, reminded us that "a court must indulge a 'strong presumption' that counsel's conduct falls within the wide range of reasonable professional assistance because it is all too easy to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight." *Cone*, 122 S. Ct. at 1854 (*citing Strickland*); *see also Mason*, 320 F.3d at 643 (Boggs, J. dissenting) (characterizing *Cone* as making "abundantly clear the extremely high standard that must be met for counsel's representation in the penalty phase to be considered constitutionally inadequate"); *but see Wiggins v. Smith*, 123 S. Ct. at 2536-37 (scope of investigation into

client's "misery as a youth" fell short of the professional standards then prevailing because counsel knew of "unfortunate childhood" and there was nothing to suggest that further investigation would have been either counterproductive or fruitless); *Williams v. Taylor*, 529 U.S. at 398-99 (holding that failure to investigate petitioner's background, which was horrific, resulted in ineffective assistance as defined by *Strickland*).

We note that the present case contains elements similar to those of previous cases in which this court has been sufficiently troubled by allegations of ineffective assistance that we either granted the writ or remanded for an evidentiary hearing. Among other factors, this court has found it telling that "trial counsel did not begin preparing for the mitigation phase of the trial until after conviction." *Greer*, 264 F.3d at 676-77; *see also Williams*, 529 U.S. at 395 (finding it significant that counsel began preparation for mitigation only a week before trial). Despite *Greer* and other Sixth Circuit cases that have reached a similar result, *see, e.g., Mason*, 320 F.3d at 624-26 (remanding for evidentiary hearing concerning failure to develop mitigating evidence of petitioner's troubled childhood); *Coleman v. Mitchell*, 268 F.3d 417, 450-52 (6th Cir. 2001) (ineffective assistance during mitigation for failure to investigate or present evidence of troubled background); *Skaggs v. Parker*, 235 F.3d 261, 269-70 (6th Cir. 2001); *Austin v. Bell*, 126 F.3d 843, 848 (6th Cir. 1997); *Glenn v. Tate*, 71 F.3d 1204, 1206-08 (6th Cir. 1995), we are hard-pressed to reconcile *Cone* with a conclusion that counsel rendered constitutionally ineffective assistance by not vigorously interviewing family members and pressing them to testify during the sentencing phase of the trial. While counsel in *Wiggins* had sufficient information about their client's horrific childhood to render their failure to pursue further investigation professionally unreasonable, there is nothing to

suggest that counsel in the instant case ignored known leads that might have helped them to prepare their case in mitigation. As the Court has reminded us, "*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing." *Wiggins*, 123 S. Ct. at 2541.

Even if we assume, however, that trial counsel performed ineffectively during the mitigation phase of the trial, we find that the deficiency did not prejudice petitioner's case. As already explained, to show prejudice a defendant must demonstrate that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. Also, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Our inquiry is limited to asking whether the testimony of the eight potential character witnesses described above, which include five family members, would have created a reasonable probability that, had the jury heard from them, its verdict would have been different.

Undoubtedly, testimony from these family members would have helped to humanize petitioner by showing the jury that they loved and valued him, that he had been a good son, brother, and parent. On the other hand, we cannot say that this testimony would likely have led to a different result because it is entirely possible, as the Tennessee Court of Criminal Appeals pointed out, that the jury could have concluded that petitioner was even more culpable because he had enjoyed a loving family but had brutally murdered a wife

who loved him. Also, as the district court noted, testimony from family members would have opened the door to rebuttal evidence about petitioner's extramarital affairs, undercutting the positive image presented by his family.

The mitigating evidence proffered by petitioner falls short of the quantum required by *Wiggins*, *Cone*, and *Williams*. In *Williams*, for example, the Court found it unreasonable for the Virginia Supreme Court to conclude that petitioner had not been prejudiced by counsel's failure to investigate and present readily available evidence "graphically describing Williams' nightmarish childhood." 529 U.S. at 395, 397-98. Likewise in *Wiggins*, the Court concluded, "Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance." 123 S. Ct. at 2543. This court's cases do not particularly strengthen petitioner's position either. *See, e.g., Coleman*, 268 F.3d at 451-53 (finding prejudice where counsel failed to present evidence of petitioner's horrific childhood, his numerous mental and emotional disorders, and his low IQ); *Carter v. Bell*, 218 F.3d 581, 600 (6th Cir. 2000) (finding prejudice where counsel failed to present evidence "of a childhood in which abuse, neglect and hunger were normal"); *Skaggs*, 235 F.3d at 271-72 (finding prejudice for failure to present evidence of defendant's mild mental retardation and diminished capacity, "the one topic which may have convinced the jury that a death sentence was not justified"). Given the precedents that inform our decision, we conclude that, even if we assume that trial counsel were professionally deficient under the Sixth Amendment for failing to present mitigating testimony in the form of character witnesses, petitioner has not shown that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

IV.

The judgment of the district court is **AFFIRMED**.

CLAY, Circuit Judge, dissenting.

In holding that Petitioner's counsel's performance did not fall below an objective standard of reasonableness as measured by prevailing professional norms, the majority engages in speculation and conjecture about what evidence defense counsel's investigation would have turned up and the nature of various witnesses' testimony had defense counsel performed in accordance with acceptable professional standards in death penalty litigation. In so doing, the majority resolves all doubts against Petitioner and holds that none of the evidence Petitioner's counsel might have garnered would have sufficiently impacted the jury's decision-making to alter the outcome of the penalty phase trial. Contrary to the majority, I believe that the record is too conflicted as to whether potential witnesses would have been willing to testify, and the nature of the testimony is too sparse to permit the formation of a reliable opinion as to whether counsel's investigation into Petitioner's family, social, or psychological history was adequate under an objective standard. Thus, I would remand for an evidentiary hearing so that the record could be developed as to counsel's investigation in this regard, thereby allowing for an informed decision as to whether Petitioner was prejudiced and ultimately denied his Sixth Amendment right to effective assistance of counsel.

Petitioner claims that his trial counsel provided ineffective assistance during the penalty phase of the trial by failing, among other things, to investigate into Petitioner's family, social, or psychological background for mitigating evidence; failing to present Petitioner's family members, friends, and

employer as mitigating witnesses; and failing to prepare Petitioner to testify to mitigating evidence. Petitioner's case thus primarily turns on whether counsel's investigation of his family, social, and psychological history was adequate to justify their strategy of presenting a single witness other than Petitioner on Petitioner's behalf at mitigation. As in the Supreme Court's recent decision in *Wiggins v. Smith*, __ U.S. __, 123 S. Ct. 2527, 2538-539, 156 L. Ed. 2d 471 (2003), if counsel's investigation was itself inadequate, counsel's strategic choice of only presenting two witnesses on Petitioner's behalf at mitigation must also be considered objectively unreasonable under *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *See Wiggins*, 123 S. Ct. at 2538-539 (recognizing that "'strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation'") (*quoting Strickland*, 466 U.S. at 690-91).

The majority attempts to distinguish *Wiggins* by concluding that there is nothing on the record that should have caused counsel to delve deeper into Petitioner's family, social, or psychological history. However, the majority reaches this conclusion based on the limited nature of the testimony and evidence derived from Petitioner's post-conviction hearing which, as indicated, is too sparse and conflicted to make such a determination at this point of the proceedings. That is not to say that upon further review by way of an evidentiary hearing the result reached by the majority would necessarily be different. But in a case where a petitioner's life rests upon the nature of the evidence presented, it is imperative that the petitioner be allowed to present all of the evidence necessary for the court to make an informed decision. This is particularly so in a case such as this where, aside from Petitioner, the sole witness called on Petitioner's behalf was

a minister whose testimony that Petitioner had expressed that "he knew that ultimately one day he would have to give an accounting of his life to God[,]" may have actually worked against him.

Moreover, even upon this sparse record, there is evidence to indicate that counsel should have delved deeper into Petitioner's past family, social, and psychological history. For example, at the hearing on the first post-conviction petition, Petitioner testified that prior to trial he provided trial counsel with the names of a number of witnesses who could testify on his behalf, including family members, his friend Barry Gray, and others who could rebut evidence that Petitioner's marriage was rocky. A number of Petitioner's family members and acquaintances testified at the post-conviction hearing. Some of them indicated that they would have offered testimony sympathetic to Petitioner but were not called to testify or were never contacted by defense counsel. The contention of Petitioner's counsel that a number of the potential witnesses were not inclined to testify is disputed by several of them.

Specifically, Petitioner's mother, Ruby Johnson, testified that trial counsel did not ask her about Petitioner's background; however, she also testified that if asked, she would have told counsel and the jury that she did not know of any problems in Petitioner's marriage, and that he was a hard worker who cared for his family and raised well-mannered children. Likewise, Petitioner's father, James Johnson, testified at the post-conviction hearing that, if called, he would have testified that Petitioner was devoted to his family and that he was a good son, a hard worker, and a good family man. Petitioner's father also testified that trial counsel asked him "very little" about Petitioner's background and schooling, and that when he offered to testify at the mitigation hearing,

counsel stated that it would be better not to offer any testimony by family members. (J.A. at 188.)

Petitioner's brother, James Johnson, Jr., similarly testified that trial counsel did not ask about Petitioner's background, "nothing other than his arrest in Ohio, things of that nature[,]" despite the fact that Johnson had spent a significant amount of time with Petitioner and his family, and that he was willing to testify that he never knew of any problems in Petitioner's marriage. (J.A. at 188.) Johnson also testified that he advised defense counsel that he was available to testify on behalf of Petitioner at the mitigation trial, but that counsel said "it would be advisable not to." (*Id.*)

Petitioner's sister, Shirley Ward, testified that she was never contacted by trial counsel; however, if called upon she would have testified that Petitioner was a good family man who did not have any problems at home, and that the relationship between her brother and his wife seemed harmonious and happy the weekend before the murder. Petitioner's other sister, Mary Ward, testified that she told trial counsel she was available to testify at trial and that, if called, she would have testified that Petitioner loved his wife and would not have killed her.

Barry Gray, who had been a friend of Petitioner since childhood, testified at the hearing that he would have informed the jury that Petitioner was a good friend and a hard worker who seemed to care and provide for his family. Officer James Ingram, a deputy jailer with the Shelby County Sheriff's Department, testified at the hearing that when Petitioner was incarcerated, "he never had a disciplinary write-up or anything to my knowledge[,]" and that he would have been willing to testify to this effect at Petitioner's mitigation trial but did not receive a subpoena. (J.A. at 189-

90.) David Force, an owner of Force Camping where Petitioner worked, also testified at the hearing and stated that, if asked, he would have said that Petitioner was a good employee.

Petitioner also presented expert testimony at the post-conviction hearing as to the manner in which background investigations should be performed in capital cases in Tennessee. That is, Jeff Blum, administrator of the Capital Case Resource Center, testified about the necessity of speaking extensively with persons who had contact with Petitioner or his family members. Blum stated that:

> We do a fairly extensive search of all the various points of contact an individual would have had sometime in their past life. And through that process, gathering as much written material, papers, files, records that we can in that process toward discovering information we feel may be helpful in mitigation, and at the same time, gathering names of other individuals who may be helpful in testifying on behalf of the defendant.

(J.A. at 191-92.)

Thus, even in light of the record before us, there is clear indication that defense counsel should have investigated further into Petitioner's family, social, and psychological history before making the strategic choice to present only one other witness aside from Petitioner at the mitigation hearing. The statements made by Petitioner's family, close friends, and employer provided a basis upon which counsel should have known that further inquiry into Petitioner's past was needed for the purpose of allowing these witnesses to convince as few as one juror that Petitioner was someone undeserving of the

death penalty. Further factual development by way of an evidentiary hearing may serve to support this conclusion thereby establishing that counsel failed to conduct an adequate investigation; this is particularly so where, in addition to the above testimony, the record indicates that counsel failed to obtain any medical, school, or social service records concerning Petitioner.

Indeed, Respondent does not contest that trial counsel's performance during the penalty phase of the trial fell below an objective standard of reasonableness. Rather, Respondent only contests the second prong of *Strickland*-whether trial counsel's failure to investigate and present mitigating evidence prejudiced Petitioner. *See Strickland*, 466 U.S. at 687. Respondent argues that no prejudice occurred to Petitioner because the evidence merely consisted of family members' statements that Petitioner was a good family man who had a happy marriage, and a good friend and employee.

The fallacy in Respondent's argument, however, is that it assumes that the only mitigating evidence trial counsel could have presented was the testimony of Petitioner's family members, friends, and employer, and it assumes that the nature of these witnesses' testimony was adequately developed. A proper investigation into Petitioner's background and the nature of the witnesses' testimony may have revealed other mitigating evidence to persuade the jury to sentence Petitioner to life in prison as opposed to death. Because there is no evidence on the record of what an investigation of Petitioner's background would have revealed, this Court cannot conclude that Petitioner was not prejudiced by trial counsel's failure to investigate and present mitigating evidence. Thus, this case should be remanded with instructions that the district court conduct an evidentiary hearing on Petitioner's claim for further factfinding as to the

scope of counsel's investigation and the nature of what evidence, if any, further investigation would have revealed. *See Mason v. Mitchell*, 320 F.3d 604, 620-21 (6th Cir. 2003) ("Because the record as it now stands reflects disputes about defense counsel's performance with respect to the sentencing phase of [the petitioner's trial], we remand the case to the district court for an evidentiary hearing on this issue.").

Similarly, the majority's contention that the error, if any, was harmless because testimony as to Petitioner's character as a loving husband or family man would have opened the door to potentially unfavorable testimony, is also based on speculation. That is to say, on the record before us, it is impossible to conclude that any unfavorable testimony that may have come into evidence by way of favorable character evidence would have unanimously persuaded a jury that the unfavorable testimony outweighed the favorable testimony. *See id.*

The record before the Court, although needing further factual development, provides clear indication that Petitioner's trial counsel failed in their responsibility to investigate and present mitigating evidence at Petitioner's penalty phase trial. Contrary to the majority's conclusion, it cannot be determined, based upon the present record, whether proper representation of Petitioner at the penalty phase trial would have resulted in a different outcome. Since the record fails to establish whether the scope of counsel's investigation was adequate under *Strickland*, it cannot be said at this juncture whether Petitioner was prejudiced by counsel's performance. *Compare Wiggins*, 123 S. Ct. at 2538-539. Thus, I would remand for an evidentiary hearing. Only by so doing could we determine whether Petitioner received constitutionally adequate representation before requiring Petitioner to pay the ultimate penalty. *See Mason*, 320 F.3d at 620-21 (remanding

the death penalty petitioner's ineffective assistance of counsel claim for an evidentiary hearing where the record was inadequate to allow for meaningful appellate review as to whether counsel performed an adequate investigation and preparation as to mitigating evidence); *see also Griffin v. United States*, 330 F.3d 733, 739 (6th Cir. 2003) (remanding the petitioner's § 2255 motion to the district court for an evidentiary hearing where the petitioner "presented a potentially meritorious claim for ineffective assistance of counsel" while noting that the petitioner "deserved the right to develop a record" in order to demonstrate prejudice). I therefore respectfully dissent.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 East Fifth Street, Room 532
Potter Stewart U.S. Courthouse
Cincinnati, OH 45202-3988

Leonard Green
Clerk

Ms. Audrey Crockett
(513) 564-7032
www.ca6.uscourts.gov

Filed: February 12, 2002

Mr. C. Mark Pickrell
3200 W. End Avenue
Suite 500, P.O. Box 50478
Nashville, TN 37205-0478

RE: 01-5451
Johnson vs. Bell
District Court No. 97-03052

Dear Counsel:

This letter will confirm that the court has denied your motion for consideration of an amendment to the certificate of appealability.

Very truly yours,
Leonard Green, Clerk

(Ms.) Audrey Crockett
Case Manager

cc: Ms. Alice B. Lustre

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 East Fifth Street, Room 532
Potter Stewart U.S. Courthouse
Cincinnati, OH 45202-3988

Leonard Green
Clerk

Ms. Audrey Crockett
(513) 564-7032
www.ca6.uscourts.gov

Filed: January 3, 2002

Mr. C. Mark Pickrell
3200 W. End Avenue
Suite 500, P.O. Box 50478
Nashville, TN 37205-0478

RE: 01-5451
Johnson vs. Bell
District Court No. 97-03052

Dear Counsel:

This letter will confirm that the court has denied your motion and supplemental motion to amend the certificate of appealability.

Very truly yours,
Leonard Green, Clerk

(Ms.) Audrey Crockett
Case Manager

cc: Ms. Alice B. Lustre

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION

Case No. 97-3052-DO

[Filed Feb. 28, 2001]

DONNIE E. JOHNSON, Petitioner,
v.
RICKY BELL, Warden, RIVERBEND MAXIMUM SECURITY INSTITUTION, Respondent.

JUDGE: BERNICE B. DONALD, UNITED STATES DISTRICT JUDGE.

MEMORANDUM AND ORDER ON RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

A. INTRODUCTION

Petitioner, Donnie E. Johnson, is confined as an inmate on death row at the Riverbend Maximum Security Facility in Nashville, Tennessee. In preparation for filing a petition for

a writ of habeas corpus pursuant to 28 U.S.C. § 2254, Johnson filed a number of motions related to his capital murder conviction and death sentence, including a motion for stay of execution pursuant to 28 U.S.C. § 2251, a motion pursuant to 28 U.S.C. § 1915 to proceed in forma pauperis in filing the habeas petition, an affidavit in support of the section 1915 motion, and an application pursuant to 21 U.S.C. § 848(q) for appointment of counsel to prepare and file a section 2254 habeas petition.

This case was originally assigned to the Honorable Jerome E. Turner, who granted a stay of execution, granted leave to proceed in forma pauperis, and appointed counsel for Johnson. Counsel filed a habeas petition, which respondent has answered. Respondent has also filed the complete state court record with the Court. On January 26, 1999, Judge Turner entered an order holding inapplicable to this petition Chapter 154 of Title 28 of the United States Code, enacted by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. 104-132, Title I, § 102, 110 Stat. 1220 (Apr. 24, 1996), and holding applicable to this petition Chapter 153 of Title 28, as amended by the AEDPA. (Docket Entry 46.) Respondent then moved for partial summary judgment. In response, petitioner filed a motion seeking leave to conduct discovery. Respondent opposed that motion and submitted several factual affidavits. On June 4, 1999, Judge Turner issued an order denying petitioner leave to conduct discovery and ordering him to respond to the motion for partial summary judgment. (Docket Entry 72.)

The partial summary judgment motion was fully briefed and submitted to Judge Turner.[1] Following the death of Judge Turner, the action was reassigned to this Court. For the reasons that follow, the Court now grants summary judgment for respondent.[2]

B. STATE COURT PROCEDURAL HISTORY

In October, 1985, a Shelby County, Tennessee, Criminal Court jury convicted petitioner of first degree murder in the death of his wife, Connie Johnson, and sentenced him to

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[1] Because respondent has moved for summary judgment on each claim in the Petition, it is not entirely clear why this motion is termed one for "partial" summary judgment. The Court assumes that respondent intended to reserve the right to make a later motion in the event the Petition is not dismissed.

[2] In their briefs, the parties devote much effort to skirmishing about whose burden it is to come forward with factual and legal authority on this motion. This argument reflects a misunderstanding of the fundamental difference between a habeas proceeding and an ordinary civil action. In most civil actions, the effect of denying a motion for summary judgment is that the case proceeds to trial or, at least, additional discovery. In a habeas proceeding, by contrast, as discussed in more detail in later sections, the ability to conduct an evidentiary hearing, or even to use the fruits of any discovery, is severely constrained. Accordingly, it is in the interest of both parties to provide this Court with any factual or legal support of which they are aware. Even where the parties have not done so, the Court has nonetheless attempted to resolve each of the issues presented by the Petition. *Cf. O'Neal v. McAninch*, 513 U.S. 432, 437, 115 S. Ct. 992, 130 L. Ed. 2d 947 (1995) ("'Whether or not counsel are helpful, it is still the responsibility of the . . . court, once it concludes there was error, to determine whether the error affected the judgment.'") (ellipses in original; citation omitted).

death by electrocution. The Tennessee Supreme Court affirmed the conviction and sentence. *State v. Johnson*, 743 S.W.2d 154 (Tenn. 1987), *cert. denied*, 485 U.S. 994, 108 S. Ct. 1303, 99 L. Ed. 2d 513 (1988). A proper consideration of this federal habeas petition requires a detailed recitation of the procedural history in state court, beginning with the facts of the murder itself. The following is taken from the Tennessee Supreme Court's opinion:

> At the time of the trial, appellant was thirty-four years of age. The homicide occurred on December 8, 1984. For three or four years prior to that time, appellant had been the manager and a salesman for a camping equipment center in Memphis. His wife had also worked at the center for a period of twelve to eighteen months, but she was not so employed at the time of her death. Appellant had adopted a daughter of his wife by a former marriage, and the couple had a son who was about four years old at the time of the trial.
>
> There had been some difficulties in the marriage, and appellant's wife had from time to time threatened to separate from him. There is no evidence that appellant had ever seriously injured his wife prior to December 1984. He had admittedly been unfaithful to her although he denied involvement with any other woman at the time of his wife's death. More than a year and a half prior to her death, Mrs. Johnson had purchased a policy of life insurance in which appellant was named as primary beneficiary and her sister as contingent beneficiary. Following the death of Mrs. Johnson, both her sister and appellant made claims for the policy proceeds of fifty thousand dollars.

Mrs. Johnson suffered a most terrible death by suffocation. From this record there is no question but that appellant or one Ronnie McCoy murdered her. Appellant did not testify until the sentencing hearing. At the guilt hearing McCoy testified that appellant killed Mrs. Johnson at appellant's place of employment in the early evening of Saturday, December 8, 1984, the time of death being estimated at between 6:30 and 7 p.m.

McCoy was a prisoner on work release at the place where appellant was employed. Appellant transported McCoy to and from work each day, checking him in and out at the Shelby County Penal Farm near Memphis. Appellant did so on the date of the homicide. McCoy and two employees of the penal farm testified that appellant transported McCoy to the penal farm after work on that date and checked him in at about 7:17 p.m.

McCoy testified that he left appellant and Mrs. Johnson alone in the office of the camping center while McCoy attended to some chores preparatory to leaving the place of business for the day. He was gone for some ten to fifteen minutes, and when he returned to the office, he testified that he found Mrs. Johnson strangled or suffocated to death.

It is not necessary here to give the horrible details of the manner of her death. It is sufficient to state that a large plastic garbage bag had been forced into her mouth, resulting in her strangulation and asphyxiation. She bled from the nose and ears, and traces of blood were found on a couch in the office where her death occurred. There was testimony that she would have

been conscious during the terrifying ordeal and that from one to four minutes would have elapsed before she expired.

Appellant did not testify until the sentencing hearing after he had already been found guilty of murder in the first degree. At that time he denied killing his wife and attempted to place responsibility upon McCoy. He testified that he left McCoy and Mrs. Johnson alone in the sales office for a few minutes. He had given Mrs. Johnson about $250 earlier that morning and about $200 again that afternoon for purposes of Christmas shopping. It was his contention that McCoy tried to rob Mrs. Johnson and killed her in the process.

Appellant and McCoy each testified to being afraid of the other. In all events, however, they collaborated, willingly or otherwise, in transporting the body of Mrs. Johnson in her 1981 Ford van from the sales office to a shopping center a few miles away. They also placed inside the van her broken spectacles, her shoes, her coat and some earrings which had become dislodged in her struggle for breath. They parked the van on the edge of a large shopping center and left it there. Each testified that the other drove the van from the office to the shopping center. Both agreed that appellant then transported McCoy to the penal farm in appellant's pick-up truck. McCoy testified that he had driven the truck to the shopping center following appellant who was driving the van.

In all events the van was left on the parking lot overnight. A security officer at one of the retail stores noted its presence, and in the early morning hours of

December 9 he placed a ticket on the vehicle but did not open it.

Appellant called his employer near 11 a.m. on the morning of Sunday, December 9, pretending to make inquiry about his wife. He said that she had not come home on the previous evening and had not picked up their children from the home of appellant's brother. Appellant had spent the night at the sales office and early on the morning of December 9 had delivered a trailer to a customer at a camp site. Upon returning from that trip, he placed the call to his employer.

The employer, Mr. James Force, and his wife were advised by appellant that Mrs. Johnson was supposed to have gone Christmas shopping on the previous evening. Mr. and Mrs. Force agreed to assist in finding her. In the course of doing so they found her van, which was well known to them, at the shopping center. Upon opening the van, they found the lifeless body of Mrs. Johnson. They immediately reported to security personnel at the mall. Investigating police officers arrived in a short time.

Both Mr. and Mrs. Force and appellant gave statements to the police. Appellant denied any involvement in the death of his wife. He made no mention of having known that McCoy killed her and denied that he had any knowledge of when or how her van had reached the premises of the shopping mall.

In addition to the direct testimony of McCoy, there was other strong evidence implicating appellant in the homicide. Appellant had called one Barry Pfister at about 9 p.m. on Saturday evening to inquire about his

wife. He told Pfister that he and his wife were coming to the sales office to try to work out their differences. He asked Pfister to observe if and when Mrs. Johnson arrived and to advise her that appellant was on his way.

At some time during the evening, appellant called on a former girl friend, Debbie McKee, who was working at a local motel. She had called him earlier in the evening, and he drove to her place of employment at some time between 7:30 and 8 p.m. Appellant admitted to the police that he had previously had an affair with Ms. McKee but denied that there was any sexual relationship between them at the time of the homicide.

When Mrs. Johnson's van was opened by police at the shopping mall, it did not contain ignition keys. Mrs. Johnson's set of ignition keys, together with her hairbrush and some other personal items, were found behind the seat of appellant's truck when it was seized following the discovery of Mrs. Johnson's body. Sisters of Mrs. Johnson testified that they could identify the keys which were the only set of keys to the van which Mrs. Johnson had.

The only witnesses called by appellant at the guilt phase were an insurance agent who testified about the life insurance claims made under Mrs. Johnson's policy and one Paul Adams, manager of a tent shop at the camping center. He testified that appellant had come to the door of his shop at about 7 p.m. on Saturday, December 8.

Id. at 155-57.

Petitioner's trial commenced on September 30, 1985[3] and the case was presented to the jury on October 3, 1985, when the jury returned its verdict finding the petitioner guilty of first degree murder. The sentencing phase of the trial took place on October 3 and 4, 1985. At the conclusion of jury deliberations on October 4, 1985, the petitioner was sentenced to death. The jury found both the aggravating circumstances presented to them: that the defendant was previously convicted of one or more felonies other than the present charge which involved the use of threat or violence to the person, and that the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind.[4]

On October 31, 1985, trial counsel filed a motion seeking a judgment of acquittal or, alternatively, a new trial. *See* Addendum 1, Vol. 1, at 27-28. The trial court judge denied that motion on November 21, 1985. *See id.* at 30.

A notice of appeal to the Tennessee Supreme Court was filed on December 17, 1985. *See id.* at 40. Thereafter, on July 14, 1986, trial counsel filed a brief in the Tennessee Supreme Court that raised the four issues that were presented in the motion for a new trial. *See* Addendum 4. At some time after the direct appeal was fully briefed, petitioner apparently

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[3] Petitioner was represented at trial by Jeff Crow and Clark Washington.

[4] At the close of testimony in the sentencing phase, the trial judge ruled there was insufficient evidence in the record to charge the jury with respect to an additional aggravating circumstance sought by the State, that the murder was committed for remuneration. *See* Addendum 1, Vol. 5, at 526-28 (discussing the proposed charge); *id.*, Vol. 1, at 15 (Notice as to the Death Penalty and Aggravating Circumstances).

filed charges of attorney misconduct against trial counsel, *see* Addendum 13, Vol. 2, at 149-50, who were permitted to withdraw, *see id.*, Vol. 1, at 20. Thereafter, new counsel were appointed to represent petitioner before the Tennessee Supreme Court and to file a supplemental brief. *See id.* at 22.[5] That brief, which was filed on April 28, 1987, raised eleven additional issues. *See* Addendum 7.

The decision of the Tennessee Supreme Court affirming petitioner's conviction and sentence was issued December 21, 1987. *State v. Johnson*, 743 S.W.2d 154 (Tenn. 1987). With respect to the issues raised by substitute counsel, the Court stated that "most of them involve matters as to which no objection was made at the trial and no assignment of error contained in the motion for a new trial." *Id.* at 158. Nonetheless, the Court proceeded to address the merits of a number of those issues. *See id.* at 158-60.

Substitute counsel filed a petition for a writ of certiorari with the United States Supreme Court on or about February 18, 1998. *See* Addendum 10. The Supreme Court denied the petition on April 4, 1988. *See* Addendum 12. On April 18, 1988, the Tennessee Supreme Court scheduled petitioner's execution for June 7, 1988. *See* Addendum 13, Vol. 1, at 29. Thereafter, on May 12, 1988, the Tennessee Supreme Court issued an order postponing petitioner's execution date until September 8, 1988 on the grounds that

> counsel representing [petitioner] in his direct appeal to this Court have advised that they wish to be relieved and that [petitioner] desires to file a post-conviction

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[5] J. Russell Heldman and James L. Weatherly, Jr. were appointed substitute counsel for petitioner on direct appeal.

> relief petition in the Criminal Court of Shelby County and to have new counsel appointed for that purpose.

Id. at 31. The Court further ordered that, in the event of a timely filing of a petition for post-conviction relief, petitioner's execution would be stayed until a final disposition in that proceeding. *See id.* at 31-32.

Petitioner filed a pro se petition pursuant to the then-current version of the Tennessee Post-Conviction Procedure Act, Tenn. Code Ann. §§ 40-30-101 to -124, in the Shelby County Criminal Court on or about May 8, 1988. *See id.* at 34. That petition raised a number of claims, the most significant of which was a claim of ineffective assistance of counsel at trial and on direct appeal. *See id.* at 34-37.[6] The state court petition was assigned to the judge who had conducted petitioner's original trial, who appointed the public defender to represent petitioner. *See id.* at 52.[7]

Petitioner had very definite ideas about the issues he wanted raised in the state post-conviction proceeding. From this point forward, the state-court record reveals continuous conflicts between petitioner and the numerous attorneys appointed to represent him. Thus, post-conviction counsel filed a motion on September 21, 1988 seeking an order allowing petitioner to act as co-counsel and participate in his own defense. *See id.* at 66. Several months later, petitioner became dissatisfied with the performance of his court-

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[6] At that time, petitioner apparently did not complain about the performance of substitute counsel on direct appeal. *See id.* at 35.

[7] Petitioner was represented during the post-conviction proceeding by Gwendolyn Rooks and Robert Jones of the Shelby County Public Defender's Office.

appointed counsel and advised her that he was "firing" her. Accordingly, on November 29, 1988, post-conviction counsel filed a motion seeking to withdraw. *See id.* at 65. Petitioner simultaneously filed a motion seeking appointment of new counsel or, in the alternative, leave to proceed pro se. *See id.* at 69. (Various letters from petitioner to his post-conviction counsel are attached as Exhibits 7-13 and 15-17 to Petitioner's Response to Respondent's First Motion for Partial Summary Judgment ("P. Br.").) On December 15, 1988, the court issued an order denying the various motions. *See id.* at 74. That order stated:

> The Petitioner has no standing to "fire" his attorney appointed by this Court to represent the Petitioner. The Court will not release the Public Defender's office without good cause. Good cause has not been shown by the Petitioner. From past experience this Court has the utmost faith in the ability of Ms. Rooks and Mr. Jones to adequately represent the Petitioner's allegations.

Id.

Thereafter, on March 29, 1988, post-conviction counsel filed an amended petition incorporating all the material contained in the original petition and raising additional contentions that trial counsel's performance during the sentencing phase of the trial was deficient. The amended petition alleged, *inter alia*, that trial counsel failed to present sufficient mitigating evidence.[8]

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[8] A copy of the Amended Petition and a *nunc pro tunc* order of the Court, dated January 14, 1991, are contained at the end of

The evidentiary hearing on the petition for post-conviction relief commenced on March 31, 1989 and continued on April 3, 1989. *See id.* at 89. During that hearing, the court heard the testimony of twenty-seven (27) witnesses called by petitioner and three witnesses called by the State. These witnesses included the petitioner, each of the attorneys who had represented him at and prior to trial, various witnesses who previously testified at trial, numerous relatives and one friend, and several experts on the proper investigation and conduct of the sentencing phase of a capital case. Thereafter, on August 2, 1989, the court issued an order denying the petition for post-conviction relief. *See id.* at 96-104.

A notice of appeal was filed with the Tennessee Court of Criminal Appeals on May 25, 1990. *See id.* at 108.[9]

Addendum 13, Vol. 1, following page 119. These additional pages are not numbered.

[9] On or about May 24, 1990, a judge of the Tennessee Court of Criminal Appeals issued an order waiving the 30-day notice of appeal requirement pursuant to Rule 4(a), Tennessee Rules of Criminal Procedure. *See* Addendum 16. The State filed a petition to rehear, see Addendum 17; *see also* Addendum 15 (State's Response to Appellant's Motion to Waive Deadline for Filing Notice of Appeal), which was denied on June 8, 1990. *See* Addendum 18. Post-conviction counsel attributed petitioner's failure to file a timely notice of appeal to the fact that, after the trial judge denied the petition, petitioner informed his attorneys that he no longer wanted them to represent him and would instead hire private counsel. *See* Addendum 14. This fact was not brought to the attention of the trial court judge, and no order was entered relieving counsel from further representation. *See* Addendum 16 at 1-2. Accordingly, the Court stated that it "is not going to permit the appellant to be executed because of a procedural default which occurred when counsel abandoned him without authorization. . . .

Petitioner's brief was filed January 22, 1991. See Addendum 19.[10] On March 20, 1991, the Court of Criminal Appeals issued an order transferring to the Tennessee Supreme Court petitioner's claim that he was denied effective assistance of counsel on his direct appeal to that court. The Tennessee Court of Criminal Appeals retained jurisdiction over the remaining issues raised on appeal. *See* Addendum 21. Thereafter, on June 26, 1991, the Tennessee Court of Criminal Appeals issued an opinion affirming the trial court judgment. *See* Addendum 22.

On June 27, 1991, the Shelby County Public Defender's Office moved for permission to withdraw as counsel on the ground that that office did not see a basis for an Application for Permission to Appeal to the Tennessee Supreme Court. *See* Addendum 23, at 1. That motion was granted on July 3, 1991. *See* Addendum 24.

Consequently, it is in the interest of justice to waive the notice of appeal requirement." *Id.* at 3.

[10] Petitioner's brief on appeal was filed by James H. Bostick, an assistant public defender. A.C. Wharton, Jr., Shelby County Public Defender, was of counsel.

Previously, on or about December 13, 1990, Mr. Bostick had filed a motion seeking to relieve the Shelby County Public Defender's Office from further representation of petitioner on the grounds that petitioner had filed a second post-conviction petition alleging ineffective assistance by Ms. Rooks and Mr. Jones. Petitioner apparently filed a pro se motion to the same effect. These motions were apparently denied by the Tennessee Court of Criminal Appeals on December 20, 1990. (Copies of the motion papers filed by the Shelby County Public Defender's Office and the first page of the court's order are contained at the end of Addendum 19. The remainder of the court's order does not appear in the record.

At the time of this order, that portion of petitioner's appeal that was before the Tennessee Supreme Court was still pending and, on October 29, 1991, in response to a letter received from petitioner, *see* P. Br., Exhibit 26, the Tennessee Supreme Court issued an order making clear that "the Court of Criminal Appeals has not relieved counsel in the appeal still pending before this Court," *see* Addendum 26, at 1. The Tennessee Supreme Court elected to treat petitioner's letter as a Rule 11 application for permission to appeal, and it appointed counsel to represent petitioner in that application. *See id.* at 2-3.[11]

Petitioner's brief on the ineffective assistance of appellate counsel issue was filed on or about March 5, 1992. *See* Addendum 30. Likewise, petitioner's counsel filed an Amended Rule 11 Application for Permission to Appeal and Supporting Brief of Appellant on or about March 18, 1992. *See* Addendum 31. On or about March 19, 1992, the State filed a motion seeking an order holding the ineffective assistance of appellate counsel issue in abeyance pending resolution of petitioner's motion for permission to appeal. *See* Addendum 32. The Tennessee Supreme Court denied that motion on April 7, 1992, and, instead, ordered that, "in the interests of judicial efficiency, . . . the appellant's issue regarding the effectiveness of his counsel will be considered along with his application for permission to appeal." Addendum 34. After the State responded to the Amended

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[11] The order of the Tennessee Supreme Court appointed Mr. Bostick of the Shelby County Public Defender's Office to represent petitioner. *See id.* On November 7, 1991, Mr. Bostick filed a motion to be relieved on the ground that he had retired from the Public Defender's Office. *See* Addendum 27. That motion was granted on December 5, 1991, and Walker Gwinn was appointed to represent petitioner as substitute counsel. *See* Addendum 28.

Rule 11 Application, *see* Addendum 35, petitioner filed a supplemental pro se brief on or about April 23, 1992. *See* Addendum 36. Shortly thereafter, the State submitted its brief on the ineffective assistance of appellate counsel issue. *See* Addendum 37.

In response to what it characterized as "[a] plethora of petitions, motions and various pleadings [that] have been filed in this proceeding by petitioner pro-se and by appointed counsel," Addendum 38, at 1, the Tennessee Supreme Court issued an order, dated July 2, 1992, that summarized the procedural posture and ordered as follows:

1. The clerk of this Court is directed to consolidate all issues raised in this case and to docket the same for consideration at the November, 1992 term of Court at Jackson.

2. Counsel for petitioner and for the State are directed to file all required briefs and pleadings, etc. necessary to the disposition of the proceedings at the November term.

3. No further pro-se pleadings will be filed except by express permission of the Court.

4. All motions[,] pleadings, etc. not heretofore ruled upon are herewith denied, subject to re-submission by counsel.

Id. at 3-4.

On March 8, 1993, the Tennessee Supreme Court issued an order denying permission to appeal. *See* Addendum 40. That day the Tennessee Supreme Court also issued an opinion

rejecting petitioner's claim that he was denied effective assistance of counsel on direct appeal. *See* Addendum 39. The Tennessee Supreme Court based its decision on the fact that it had fully reviewed on the merits each of the issues raised in petitioner's various briefs on direct appeal:

> Substitute counsel filed a supplemental brief raising eleven additional issues, and those issues were fully reviewed, on the merits, by this Court. Here, the defendant fails to recognize that we considered the issues raised by substitute counsel and found that each one was either without merit, or if error occurred, it was harmless beyond a reasonable doubt. Therefore, even assuming for the purpose of argument that the initial appellate counsel's performance was deficient, the defendant has not demonstrated that the deficient performance prejudiced his appeal. . . .

Id. at 5.

In the meantime, because of his dissatisfaction with the performance of post-conviction counsel, petitioner filed a successive pro se petition in the Shelby County Criminal Court pursuant to the Tennessee Post-Conviction Procedure Act on or about June 5, 1989. This new petition alleged that petitioner had received inadequate assistance of post-conviction counsel and also reiterated many of the same claims that were alleged in the first post-conviction proceeding. *See* P. Br., Exhibit 14.[12] The successive Petition was accompanied by a lengthy affidavit of petitioner, which contains numerous additional allegations not incorporated into

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[12] The various Addenda submitted to this Court do not include a copy of this second petition.

the Petition, *see* Addendum 41, Vol. 1, at 37-51, as well as by factual affidavits submitted by family members and a friend who testified at the first post-conviction hearing[13] and an additional friend and a correction officer who submit that they were not called to testify notwithstanding their availability and willingness to offer evidence.[14]

The State moved to dismiss the successive petition on or about December 5, 1989 on the grounds that certain claims had been previously determined in the first post-conviction petition and the others were waived. *See id.* at 73-75.[15] Thereafter, on or about December 12, 1990, petitioner filed a motion seeking a continuance until resolution of his appeal of the decision in his first Petition for Post-Conviction Relief.

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[13] *See id.* at 32-34 (affidavits of Barry Gray); 52 (Mary Ward); 53 (Shirley Ward).

[14] *See id.* at 35-36 (affidavit of William Wicks); 54 (Denise Johnson).

[15] On July 12, 1989, the trial court judge appointed Thomas Veteto to represent petitioner in the successive post-conviction proceeding. *See* Addendum 41, at 56. Petitioner filed a motion on or about September 11, 1989 seeking appointment of new counsel or, in the alternative, leave to proceed pro se. *See id.* at 58-60. That motion was denied by order dated April 6, 1990. *See id.* at 89, 91. On or about April 10, 1990, petitioner filed a motion seeking to be allowed to proceed pro se. *See id.* at 92-97. Mr. Veteto also filed a motion on April 27, 1990 seeking permission to withdraw. *See id.* at 100. Mr. Veteto's motion was granted on April 27, 1990, *see id.* at 102, and, by order dated June 18, 1990, the court appointed Jim Ball to represent petitioner, *see id.* at 108. On June 22, 1990, the court also appointed Dwight E. Duncan as counsel for petitioner. *See id.* at 110.

See id. at 119-20.[16] Although the trial court judge apparently did not rule on this motion, the hearing on the State's motion to dismiss the successive petition occurred on August 22, 1991, shortly after the Tennessee Court of Criminal Appeals rendered its decision resolving most of the issues raised on appeal. *See id.* at 126.

At the hearing, the trial court judge heard arguments by counsel but refused to permit petitioner to present evidence in support of this petition. *See id.*, Vol. 2. Petitioner's counsel argued that there was no waiver because appointed counsel refused to present valid issues identified by petitioner. *See id.* at 9-16. On October 3, 1991, the trial court issued an order granting the State's motion to dismiss. *See id.*, Vol. 1, at 129. With respect to petitioner's waiver claim, the trial court wrote as follows:

> The petitioner contends that he is entitled to a second evidentiary hearing on the basis that the issues A-Q have not been intelligently and knowingly waived. *Swanson v. State*, 749 S.W.2d 731. Swanson is not of assistance to the petitioner in that the allegation in this second petition was recognizable and available for a presentation to a competent court of jurisdiction for a determination. These are not new grounds that were not recognized at the time of conviction and have been applied retroactively. The petitioner, in a previous hearing, had every opportunity to litigate these allegations through competent counsel. This is not a

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[16] Petitioner's counsel in the successive post-conviction proceeding also sought, apparently unsuccessfully, to replace the Shelby County Public Defender's Office as counsel for petitioner in the then-pending appeals. *See id.*

> situation of a technical dismissal of a pro-se petition without benefit of counsel.

Id. at 131.

Petitioner filed a notice of appeal to the Tennessee Court of Criminal Appeals on October 31, 1991. *See id.* at 142. Petitioner's brief in support of his appeal was filed on or about August 4, 1992, *see* Addendum 42,[17] and the State filed its brief on or about September 17, 1992, *see* Addendum 43.

On March 23, 1994 the Tennessee Court of Criminal Appeals issued a lengthy opinion reversing the dismissal of petitioner's second post-conviction petition. *See* Addendum 44. The Court of Criminal Appeals assumed that post-conviction counsel had failed or refused to raise issues that petitioner had brought to their attention. *See id.* at 2; *see also id.* at 3-9. The Court held:

> In consideration of our Act limiting relief to constitutional violations which render a conviction or sentence void or voidable, we conclude that waiver of such a ground for relief in a post-conviction

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[17] Previously, on or about January 27, 1992, petitioner filed a pro se motion for appointment of counsel and for an extension of time to file his brief. *See* Addendum 29. Petitioner alleged in support of his motion that one of the attorneys formerly assigned to represent him, Dwight Duncan, had moved out of state and that the other, James Ball, had advised him of his intention to seek to withdraw. The record does not indicate the disposition of petitioner's motion. In any event, petitioner's brief was signed by both Messrs. Duncan and Ball and the cover page indicates that both attorneys had Memphis addresses more than 7 months after petitioner's pro se motion.

> proceeding is personal to the petitioner. In this respect, post-conviction counsel's role is only relevant in terms of how it bears upon the petitioner knowingly and understandingly waiving a ground for relief. . . .

Id. at 33. Thus, the Court concluded:

> As a matter of fact, if the issues relating to constitutional rights were not raised in the criminal prosecution because of the ineffective assistance of counsel and were not raised in the first post-conviction case because counsel refused the petitioner's request to raise them, we would conclude that the petitioner has rebutted the presumption of waiver. However, such determinations of fact must follow an evidentiary hearing.

Id. at 36-37. The Court of Criminal Appeals directed the trial court to conduct an evidentiary hearing in which "the petitioner has the burden of proving by a preponderance of the evidence that each ground for relief he now raises has not been waived." *Id.* at 37.

The record suggests that the State sought leave to appeal to the Tennessee Supreme Court on or about May, 1994, *see* Addendum 45,[18] and petitioner responded on or about July 1, 1994, *see* Addendum 46.[19] On or about October 9, 1995, the

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[18] The copy of this brief appearing in the record is neither signed nor dated. In the absence of any objection by petitioner, the Court assumes it to be genuine.

[19] Petitioner's brief was submitted only by James V. Ball, and the certificate of service indicates that a copy was mailed to Dwight Duncan in Las Vegas, Nevada. *See id.* at 12.

Tennessee Supreme Court issued a per curiam order granting the State's application for the purpose of remanding the case to the Court of Criminal Appeals for reconsideration in light of *House v. State*, 911 S.W.2d 705 (Tenn. 1995), *cert. denied*, 517 U.S. 1193, 116 S. Ct. 1685, 134 L. Ed. 2d 787 (1996). *See* Addendum 47.

On remand, the Tennessee Court of Criminal Appeals issued an order on or about December 15, 1995 directing the parties to file briefs directed to three specified issues. *See* Addendum 48.[20] Petitioner's supplemental brief was filed March 4, 1996, *see* Addendum 50, and the State filed its brief on April 9, 1996, *see* Addendum 51. Thereafter, on March 27, 1997, the Tennessee Court of Criminal Appeals issued its opinion holding that the trial court's dismissal of the second petition was proper. *See* Addendum 52, at 2. The court explained:

> Given House's conclusions, the petitioner's claims about the ineffectiveness, failures and refusals of counsel in his first post-conviction case neither refute previous determinations of some grounds nor rebut the presumption of waiver as to other grounds. Further, he does not now specify the violation of any particular fundamental trial right that would require his personal waiver in a knowing and understood fashion.

Id. at 4-5 (footnote omitted).

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[20] The Court of Criminal Appeals issued an order on January 23, 1996 substituting Paul Johnson Morrow for Messrs. Ball and Duncan as counsel for petitioner. *See* Addendum 49. Although the order refers to a motion by petitioner, a copy of that motion does not appear in the record.

Petitioner, through counsel, filed an application for permission to appeal on or about May 30, 1997. *See* Addendum 53,[21] and the State responded on June 6, 1997, *see* Addendum 54. The Tennessee Supreme Court issued a per curiam order on September 8, 1997 denying permission to appeal. *See* Addendum 55. Shortly thereafter, petitioner commenced this action.

C. PETITIONER'S FEDERAL HABEAS CLAIMS

The Petition contains the following claims:

I. PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE GUILT STAGE.

A. Petitioner's trial counsel labored under various actual conflicts of interest. In particular, the law firm that represented petitioner at trial had, shortly prior to that representation, represented Ronnie McCoy, a key prosecution witness, on various charges to which he pleaded guilty and was placed on work release. Trial counsel also represented Mr. McCoy in an unrelated civil case. In addition, trial counsel represented Debbie McKee, a witness for the State, in a divorce. This dual representation allegedly created inherent conflicts of interest. Trial counsel

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[21] The version of the document that appears in the record is not signed by petitioner's counsel, although the first page is stamped as received by the office of the Tennessee Attorney General.

could not pursue the defense that Mr. McCoy killed Mrs. Johnson. It also could not impugn the credibility of its clients. As a result, petitioner's trial was unreliable. *See* Petition at 13-15.

B. In the alternative, petitioner claims he was prejudiced in the following ways:

1. Trial counsel failed to challenge Mr. McCoy's testimony. *See* Petition at 15-19.

2. Trial counsel failed to present evidence suggesting Mr. McCoy murdered Mrs. Johnson. *See* Petition at 19-20. In particular, counsel did not argue that (a) the impression of a hand on the trash bag was inconsistent with petitioner's hand but consistent with Mr. McCoy's hand or (b) the person selected by Janice Pugh in a lineup after petitioner's arrest resembled Mr. McCoy, not petitioner. Trial counsel also did not follow up on information provided by Karen Gilbert, Mr. McCoy's girlfriend, that Mr. McCoy murdered Mrs. Johnson.

3. Trial counsel failed to present evidence suggesting that petitioner did not murder Mrs. Johnson. *See* Petition at 20-22.

4. Trial counsel engaged in conduct detrimental to petitioner by advising him to invoke his right not to testify during the guilt phase. *See* Petition at 22-23.

5. Trial counsel failed to challenge Ms. McKee's testimony that, on the night of the murder, petitioner wore a plaid shirt that was later found to contain human bloodstains although they could have obtained evidence that, at the time of the murder, he wore a blue uniform shirt. Counsel also did not bring out the fact that Ms. McKee hoped to obtain a reward from Crime Stoppers. *See* Petition at 23-24.

6. Trial counsel failed to take various additional actions beneficial to petitioner. *See* Petition at 24-26.

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XII. PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE SENTENCING PHASE.

In particular:

A. Trial counsel did not investigate mitigating circumstances, *see* Petition at 37-38;

B. Trial counsel failed to prepare petitioner for his sentencing hearing testimony. As a result, his testimony did not present evidence of mitigating circumstances but instead consisted of a denial that he killed Mrs. Johnson, *see* Petition at 38-39;

C. Trial counsel did not have a mental health expert review petitioner's background, *see* Petition at 39;

D. Trial counsel failed to investigate the propriety of, and object to, the jury instructions respecting the "heinous, atrocious, or cruel" aggravating circumstance, *see* Petition at 39;

E. Trial counsel failed to investigate whether Mrs. Johnson was alive and conscious at the time a trash bag was put into her mouth. If she was dead or unconscious, her murder would not have been "heinous, atrocious, or cruel", *see* Petition at 39;

F. Trial counsel failed to investigate and challenge the constitutional validity of the prior convictions on which the State based the "prior violent felonies" aggravating circumstance, *see* Petition at 39-40;

G. Trial counsel failed to object to introduction of petitioner's arrest record, *see* Petition at 40; and

H. Trial counsel failed to object to unconstitutional jury instructions, *see* Petition at 40.

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XVIII. PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL.

Petitioner complains of counsel's failure to raise, or argue effectively, issues 3-11, 13-17, and 20. *See* Petition at 45.

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II. Analysis of Petitioner's Claims

A. Ineffective assistance of counsel at the guilt stage of trial (Claim 1)

Count 1 of the Petition raises the issue of ineffective assistance of counsel at the guilt stage of petitioner's trial. Although petitioner first raised the issue of ineffective assistance of trial counsel in his first post-conviction proceeding, it is given a substantially different cast in this habeas Petition. The Petition alleges that trial counsel had several actual conflicts of interest that precluded them from pursuing various viable defense strategies. In his brief in opposition to respondent's summary judgment motion, petitioner also urges that, in the event the conflict theory is rejected, his Petition should be read as encompassing a standard claim of ineffective assistance of trial counsel. The Court addresses each theory separately.

1. The actual conflict of interest claim

During pretrial proceedings and at trial, petitioner was represented by Jeff Crow and Clark Washington of the firm of Schledwitz, Crow, Beliles, Bearman, Butler & Washington (the "Firm"). *See* Petition at 12. Leslie Fatowe, an associate at the Firm, was also involved in the representation of petitioner for some time prior to trial. *See id.* at 11-12. The Petition alleges that Ronnie McCoy, a key prosecution witness, was indicted for burglary and false reporting on August 14, 1984 and, on November 11, 1984, he pleaded guilty and was placed on work release. Ms. Fatowe represented Mr. McCoy in connection with these charges. *See id.* at 11, 13. Petitioner contends that Mr. McCoy's admitted participation-at least after the fact-in Mrs. Johnson's murder could have jeopardized his work release status and resulted in criminal charges. *See id.* at 12, 14. The Firm also represented Mr. McCoy in an unrelated civil matter. *See id.* at 13. Finally, the Firm represented Debbie McKee, a trial witness called by the State, in a divorce. *See id.*

Petitioner argues that this dual representation created inherent conflicts of interest. As a result of this conflict, petitioner contends that the Firm could not pursue the defense that Mr. McCoy killed Mrs. Johnson. It also could not impugn the credibility of its clients. *See id.* at 14. Petitioner contends that his trial was, therefore, unreliable.

Before evaluating the substance of this claim, including respondent's contention that much of the claim has been procedurally defaulted, the Court first addresses the legal standards for evaluating claims that a petitioner's trial counsel had a conflict of interest. The Court must then set forth the

factual record, including the development of this issue in state court. The legal analysis follows.

a. The legal standards for evaluating attorney conflict of interest claims

In *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980), the Supreme Court established the standard for evaluating claims by habeas petitioners that defense counsel represented conflicting interests. Although the Supreme Court recognized that "a possible conflict inheres in almost every instance of multiple representation," it nonetheless refused to "presume that the possibility for conflict has resulted in ineffective assistance of counsel." *Id.* at 348. Instead, the Supreme Court held that, "in order to establish a violation of the Sixth Amendment, a defendant who has raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Id.* (footnote omitted).

> [A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. . . . But until a defendant shows that his counsel actively represented competing interests, he has not established the constitutional predicate for his claim of ineffective assistance. . . .

Id. at 349-50 (citations omitted).

Thereafter, in *Burger v. Kemp*, 483 U.S. 776, 107 S. Ct. 3114, 97 L. Ed. 2d 638 (1987), the Supreme Court revisited the issue of attorney conflicts of interest in criminal representations. In that case, two law partners represented co-

indictees, who were tried separately, and worked together in preparing their defense. The district court, after conducting a full evidentiary hearing, determined that the petitioner was not entitled to relief. Once again, the Supreme Court emphasized that joint representation is not a per se violation of the Sixth Amendment. *See id.* at 783. The Supreme Court also did not articulate any general standards for determining whether the two requisites set forth in Cuyler-(i) that counsel actively represented competing interests and (ii) that the conflict of interest adversely affected the lawyer's performance-has been satisfied. Instead, in holding that neither requisite had been established, the Supreme Court conducted a detailed examination of the factual record, deferring to the credibility determinations of the district court and refusing to speculate that decisions taken by trial counsel were motivated by the conflict, rather than by legitimate tactical considerations. *See id.* at 783-90.[24]

The various Courts of Appeals have also had occasion to consider the standards to be applied in evaluating claims that a criminal defendant's trial counsel represented conflicting interests. These decisions are not completely in accord with respect to the standards to be applied to such claims.[25] Keeping in mind the statutory command in section 2254(d)(1) that the district courts apply "clearly established Federal law, as determined by the Supreme Court of the United States," the Court does not attempt to reconcile these various

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[24] Indeed, the Supreme Court stated that "we generally presume that the lawyer is fully conscious of the overarching duty of complete loyalty to his or her client." *Id.* at 784.

[25] Moreover, many opinions applied pre-AEDPA standards concerning the ability of a district court to conduct an evidentiary hearing.

approaches or to suggest the appropriate standard to be applied in this case. Instead, the Court discusses these legal standards at length to make the point that petitioner's allegation that trial counsel labored under an actual conflict of interest is a potentially serious claim that would appear to be worthy of investigation.

The Eleventh Circuit has developed the most detailed standards for evaluating attorney conflict claims. The test applied by that Court for determining whether a lawyer labored under an actual conflict of interest is as follows:

> An "actual conflict" of interest occurs when a lawyer has "inconsistent interests." . . . In order to prove that an "actual conflict" hindered petitioner's lawyer's performance, petitioner "must make a factual showing of inconsistent interests" or point to "specific instances in the record" to suggest an actual impairment of his or her interests. . . . "Generally, it is more difficult to prove that successive representation caused an actual conflict of interest than that simultaneous representation did so." . . . At a minimum, petitioner must "show that either (1) counsel's earlier representation of the witness was substantially and particularly related to counsel's later representation of [petitioner], or (2) counsel actually learned particular confidential information during the prior representation of the witness that was relevant to [petitioner's] later case." . . . . Even proof of both substantial relatedness and confidential information, however, may not necessarily be enough to demonstrate "inconsistent interests" in a successive representation case. . . . The situation may call for "other proof of inconsistent interests." . . . Overall, the "actual conflict" inquiry is fact-specific, consistent

> with the petitioner's ultimate burden "to prove that his conviction was unconstitutional."

Freund v. Butterworth, 165 F.3d 839, 859 (11th Cir.) (en banc), *cert. denied*, 528 U.S. 817, 120 S. Ct. 57, 145 L. Ed. 2d 50 (1999) (citations and footnote omitted; bracket in original); *see also Mills v. Singletary*, 161 F.3d 1273, 1287 (11th Cir. 1998), *cert. denied*, 528 U.S. 1082, 120 S. Ct. 804, 145 L. Ed. 2d 677 (2000); *Porter v. Singletary*, 14 F.3d 554, 560-61 (11th Cir.), *cert. denied*, 513 U.S. 1009, 115 S. Ct. 532, 130 L. Ed. 2d 435 (1994); *Smith v. White*, 815 F.2d 1401, 1404-06 (11th Cir.), *cert. denied*, 484 U.S. 863, 108 S. Ct. 181, 98 L. Ed. 2d 133 (1987).

Likewise, in order to show that a conflict has adversely affected a lawyer's performance, the Eleventh Circuit requires proof of the following:

> "To prove adverse effect, a habeas petitioner must satisfy three elements. First, he must point to 'some plausible alternative defense strategy or tactic [that] might have been pursued.' . . . Second, he must demonstrate that the alternative strategy or tactic was reasonable under the facts. Because prejudice is presumed . . . , the petitioner 'need not show that the defense would necessarily have been successful if [the alternative strategy or tactic] had been used,' rather he only need prove that the alternative 'possessed sufficient substance to be a viable alternative.' . . . Finally, he must show some link between the actual conflict and the decision to forgo the alternative strategy of defense. In other words, 'he must establish that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests.' . . ."

Freund, 165 F.3d at 860 (*quoting Freund v. Butterworth*, 117 F.3d 1543, 1579-80 (11th Cir. 1997), *vacated*, 135 F.3d 1419 (11th Cir. 1998)) (brackets in original).[26]

A number of other Circuits have adopted somewhat similar tests. For example, the Fifth Circuit examines the following factors:

> We have in each case focused upon the "guiding principle in this important area of Sixth Amendment jurisprudence," which is whether counsel's allegiance to the accused was compromised by competing obligations owed to other clients. . . . This is not to say that those factors employed in the threshold tests employed by our sister circuits are without import in our own precedent. A conflict of interest may exist by virtue of the fact that an attorney has confidential information that is helpful to one client but harmful to another. . . . Likewise, we have relied upon the relationship between the subject matter of the multiple representations when determining whether counsel was burdened by an actual conflict. . . . This Court has also relied upon the temporal relationship between the prior and subsequent representations. Where the prior representation has not unambiguously been terminated, or is followed closely by the subsequent representation, there is more likely to be a conflict arising from defense counsel's representation of the first client. . . . Where, on the other hand, defense

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[26] The Eleventh Circuit's standard has also been adopted by the Seventh Circuit. *See Enoch v. Gramley*, 70 F.3d 1490, 1496 (7th Cir.), *cert. denied*, 519 U.S. 829, 117 S. Ct. 95, 136 L. Ed. 2d 50 (1996).

> counsel's prior representation unambiguously terminated before the second representation began, the possibility that defense counsel's continuing obligation to his former client will impede his representation of his current client is generally much lower. . . . This Court has also relied upon the character and extent of the prior representation. Where the prior representation involved a formal and substantial attorney-client relationship, a finding of actual conflict is more likely. . . . Where, however, defense counsel's involvement in the prior representation was either transient or insubstantial, we have been less inclined to find an actual conflict. . . . Thus, whether the facts of a particular case give rise to an actual conflict depends . . . upon these and any other factors that illuminate whether the character and extensiveness of the prior representation were such that counsel is prevented "by his interest in another's welfare from vigorously promoting the welfare of his [current] client." . . .

Perillo v. Johnson, 205 F.3d 775, 799-800 (5th Cir. 2000) (citations omitted; brackets in original); *see also Simmons v. Lockhart*, 915 F.2d 372, 378 (8th Cir. 1990) ("The conflict of interest, however, must be actual, not merely theoretical. Under the cases, this appears to mean that there must have been some actual adverse effect on the defendant's case. The mere fact, for example, that one of Simmons's lawyers in the state trial court had previously represented a person later called as a prosecution witness against Simmons, does not suffice to entitle Simmons to relief. Simmons must show, in addition, that this dual representation made some difference, and that this difference was adverse to his defense."); *Burket v. Angelone*, 208 F.3d 172, 184-88 (4th Cir.), *cert. denied*, 530 U.S. 1283, 120 S. Ct. 2761, 147 L. Ed. 2d 1022 (2000);

Hess v. Mazurkiewicz, 135 F.3d 905, 910-11 (3d Cir. 1998); *Sanders v. Ratelle*, 21 F.3d 1446, 1452-53 (9th Cir. 1994).[27]

A number of Courts of Appeals have considered the precise factual situation alleged by petitioner here-defense counsel's prior representation of a significant witness for the State who is also an alternative suspect in connection with the pending charges. The different resolutions of these cases turn, in large part, on differences in the factual situations presented. *See Enoch v. Gramley*, 70 F.3d at 1496-97 (holding petitioner not entitled to evidentiary hearing; defense counsel had represented the State's witness on a totally unrelated charge 4 years ago; no showing of an actual conflict of interest); *Church v. Sullivan*, 942 F.2d 1501 (10th Cir. 1991) (holding petitioner entitled to an evidentiary hearing; the charge on which defense counsel represented the State's witness was factually intertwined with the criminal charges pending against the defendant; an effective cross-examination of the State's witness required defense counsel to probe the circumstances of, and motivations for, the crime on which he represented the witness, information clearly subject to the attorney-client privilege); *Smith v. White*, 815 F.2d at 1404-06 (upholding dismissal of the petition after an evidentiary hearing; prior representation was near in time but there was no showing it was substantially related or that defense counsel possessed confidential information learned during the prior representation; noting that the evidence "raised, at very most, a speculative possibility of conflict"); *see also Sanders v.*

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[27] By contrast, the Tenth Circuit, in a pre-AEDPA decision, held that, once a petitioner establishes an actual conflict of interest, he is entitled to an evidentiary hearing "in which he might develop facts sufficient to prove that the conflict adversely affected his representation." *Church v. Sullivan*, 942 F.2d 1501, 1510 (10th Cir. 1991).

Ratelle, 21 F.3d at 1446 (ordering that petition be granted; defense attorney in murder case had briefly represented defendant's brother and knew he was almost certainly the real murderer; there was substantial evidence that defense attorney failed to take steps that would implicate brother although that was his client's strongest defense).[28]

At a minimum, then, these cases indicate that the actual conflict of interest claim is a potentially serious issue that should have been fully developed in state court. As the next sections demonstrate, this did not happen.

b. The factual record

The record before this Court concerning the alleged conflicts of interest is skeletal. There was virtually no factual development of the issue in state court. The issue was first raised at the very close of petitioner's testimony at the post-

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[28] By contrast, for obvious reasons, courts have found actual conflicts of interest where an attorney representing the petitioner negotiates an immunity agreement for a witness. *See*, *e.g.*, *Dawan v. Lockhart*, 31 F.3d 718 (8th Cir. 1994); *Burden v. Zant*, 24 F.3d 1298, 1305 (11th Cir. 1994). However, a court is not required to find an actual conflict where trial counsel was not involved in the procurement of any deal. *See Porter v. Singletary*, 14 F.3d at 561 ("Porter failed to adduce evidence to prove an actual conflict of interest. The evidence credited by the district court establishes that Widmeyer did not refrain from asking Thomas any questions because of his prior representation of Thomas, and that Thomas was not in fact promised anything for testifying against Porter. Moreover, in light of Thomas' explicit testimony [at trial] that he was promised nothing, Widmeyer apparently decided for strategic reasons not to cross-examine Thomas about a deal, but rather to argue the inference of a deal in closing to the jury.").

conviction hearing in 1989. The entirety of petitioner's testimony on this subject was as follows:

> Q: Also, Mr. Johnson, is it not true that-or do you have information that that firm of Mr. Crow's and Mr. Washington's also represented Mr. McCoy who was a state's witness on this case?
>
> A: Yes. It's my understanding that their office represented Mr. McCoy on the charge that he was incarcerated on at the time. As to exactly which one did, I don't know.

Addendum 13, Vol. 2, at 176.

Each of the three Firm lawyers who participated in petitioner's defense testified at the post-conviction proceeding. Post-conviction counsel did ask Mr. Crow about the Firm's prior representation of Mr. McCoy, and he testified as follows:

> Q: Now, Mr. Johnson has alleged that someone in your office represented Mr. McCoy, who was the state's witness in this case, right before Mr. Johnson's case or in the case that Mr. McCoy was serving time?
>
> A: The only thing I can testify to is my own knowledge, and Ron McCoy was involved in an automobile accident at or about the time of Connie Johnson's murder. He retained me to represent him. I withdrew as soon as I learned that he was going to be a witness against Johnson.

Id., Vol. 3, at 216.[29] Mr. Washington and Ms. Fatowe were not asked about any criminal representation of Mr. McCoy.

The factual record regarding the representation of Debbie McKee also is not well developed. Mr. Crow testified as follows:

> Q: What about Ms. McKee, you also were representing her during that time for her divorce?
>
> A: I think Mr. Washington was.

Id. at 221. Mr. Washington was not asked any questions concerning his representation of Ms. McKee. Debbie McKee, who testified as well, confirmed only that Mr. Washington represented her in a divorce. *See id.*, Vol. 4, at 303.[30]

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[29] Mr. Crow was not asked any additional questions concerning his representation of Mr. McCoy in the automobile accident case. Accordingly, the state-court record does not reveal (a) the dates on which Mr. Crow commenced and terminated his representation of Mr. McCoy; (b) whether Mr. McCoy was plaintiff or defendant in that case; (c) the extent of work done by Mr. Crow on Mr. McCoy's behalf; and (d) whether Mr. Crow was in possession of client confidences related by Mr. McCoy. Mr. Crow does amplify on these matters in an affidavit submitted to this Court. *See infra* page 55.

[30] Accordingly, the record does not disclose (a) the time period during which Mr. Washington represented Ms. McKee; (b) whether the divorce was contested and, if so, whether Ms. McKee was the plaintiff or the defendant; (c) the particular legal services Mr. Washington performed for Ms. McKee; or (d) the extent to which Mr. Washington was in possession of client confidences related by Ms. McKee.

No further information was developed concerning these alleged conflicts until this action was commenced and petitioner sought leave of the Court to take discovery on this issue in order to respond to the partial summary judgment motion. Petitioner submitted a declaration of Ms. Fatowe in support of his motion. That declaration stated in relevant part as follows:

> 2. During the period August 1984 to October 1985 I worked as an Associate with the firm SCHLEDWITZ, CROW, BELILES, BEARMAN, BUTLER & WASHINGTON ("Firm").
>
> 3. Ron McCoy was a Firm client. Prior to the Firm's representation of Donnie E. Johnson, either Jeff Crow or Clark Washington referred to me Mr. McCoy and requested that I represent him on charges that he had falsely reported times he was out of the Shelby County Penal Farm.
>
> 4. I represented Mr. McCoy as requested. The attached Exhibit 1 indicates that on November 13, 1984, the final disposition of Mr. McCoy's case was a four month sentence based on a guilty plea Mr. McCoy entered.
>
> 5. Any documents that I created or reviewed during my representation of Mr. McCoy were maintained in a central file at the Firm. When I left the Firm, I did not take any of those documents with me.

Declaration of Leslie Fatowe, Esq., dated Apr. 7, 1999. The exhibit to Ms. Fatowe's declaration consists of the "jacket"

for the state court proceeding against Mr. McCoy, which lists Ms. Fatowe as the defense attorney.[31]

Respondent submitted the affidavits of Messrs. Crow and Washington in opposition to petitioner's discovery motion. Although both attorneys apparently conceded that Ms. Fatowe must have represented Mr. McCoy in the criminal proceeding, both denied any current knowledge of that representation and stated that any written records no longer exist. Mr. Crow stated as follows:

> At the time our firm was retained by Donnie Johnson, I was working on a case involving a car accident on behalf of Mr. McCoy. As soon as I became aware of McCoy's involvement in the murder trial, he was sent a letter discontinuing my representation of him. At this time, I cannot recall if I had even met with Mr. McCoy. It was our custom in the firm that car wreck cases were brought in by the original attorney and passed to me to negotiate with the insurance companies.
>
> Mr. McCoy was referred to our firm for representation by Donnie Johnson. Mr. Johnson referred a number of people to our firm following our handling of a bankruptcy case for himself and his wife.

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[31] This declaration and the accompanying exhibit are annexed as Exhibit 4 to Petitioner's Memorandum in Support of Motion for Leave to Conduct Discovery, which was filed April 12, 1999 (Docket Entry 53).

> I have reviewed the declaration of Leslie Fatowe who was an associate of the law firm. While it appears from her statement that our firm handled a criminal matter on behalf of Ronnie McCoy, I have no personal recollection of such representation or any details surrounding it. The subject of his representation by our firm was not discussed with or brought up by Mr. Johnson.
>
> The firm was dissolved about 1988. All records, other than those retained by individual firm members, were shredded. I have no records pertaining to any representation by any firm members of Ronnie McCoy.

Affidavit of Jeff A. Crow, Jr., Esq., sworn to on Apr. 27, 1999.[32]

> Likewise, Mr. Washington stated as follows:
>
> Mr. McCoy was referred to the law firm for representation by Donnie Johnson prior to the case involving Donnie Johnson, and Mr. Johnson referred people other than Mr. McCoy to the law firm.
>
> I have reviewed the declaration of Leslie Fatowe, who was an associate of the law firm. While it appears from her statement that the law firm handled a criminal matter on behalf of Ronnie McCoy, I do not

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[32] A copy of this affidavit is annexed to Respondent's Response in Opposition to Motion for Discovery, filed April 27, 1999 (Docket Entry 57).

> have any personal recollection of such representation, or any details surrounding it.
> The law firm was dissolved in 1989-1990. I retained only the files of client's [sic] whom I was representing. I do not have any records pertaining to any representation of Ronnie McCoy by the law firm or any of its members.

Affidavit of W. Clark Washington, Esq., sworn to on Apr. 27, 1999.[33]

Although an evidentiary hearing might well be useful to clarify the record concerning the various alleged conflicts, petitioner's entitlement to such a hearing must first be addressed.

c. Procedural default

Respondent contends that this claim is procedurally defaulted to the extent it rests on trial counsel's representation of Mr. McCoy on the criminal charges for which he was assigned to work release at the Penal Farm. *See* Answer at 17-18. The conflict of interest claim was not raised in the post-conviction petition, and the issue was not explicitly addressed in the trial court's decision denying relief on the petition. This failure to address the issue is not surprising in light of the minimal attention it received during the hearing. *See supra* pages 51-53.

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[33] A copy of this affidavit was filed on April 27, 1999 (Docket Entry 57). Thereafter, on May 4, 1999, respondent apparently filed a photocopy of Mr. Washington's affidavit (Docket Entry 58).

The issue of a conflict of interest was raised on appeal to the Tennessee Court of Criminal Appeals, *see* Addendum 19, at 41-42, but the criminal representation of Mr. McCoy was not discussed in that brief. The conflict issue-again without any mention of the criminal representation of McCoy-was also raised in petitioner's brief in support of his application for permission to appeal to the Tennessee Supreme Court. *See* Addendum 31, at 42-43. It would appear, therefore, that petitioner's claim that his trial counsel had a conflict of interest due to their representation of Mr. McCoy on criminal charges is procedurally defaulted.[34] Petitioner has, however, exhausted his claims based on the prior civil representation of Mr. McCoy and the representation of Ms. McKee in her divorce action.

Petitioner attempts to show "cause" for his default of the claim that the criminal representation of Mr. McCoy constituted an actual conflict of interest by suggesting that there is a factual issue whether Mr. Crow lied in his testimony at the post-conviction proceeding. *See* P. Br. at 56-58. As evidence for this position, petitioner points to the Firm's time records concerning the representation of petitioner, which show several conversations with Mr. McCoy as well as two conferences between Firm attorneys concerning Mr. McCoy. *See id.* at 57-58; *see also* Addendum 13, Vol. 6, Exhibit 2.

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[34] A number of courts have held similar claims to be procedurally defaulted. *See, e.g., Whitmore v. Avery*, 63 F.3d 688 (8th Cir. 1995), *cert. denied*, 516 U.S. 1181, 116 S. Ct. 1282, 134 L. Ed. 2d 227 (1996); *Weeks v. Jones*, 26 F.3d 1030, 1046 n.14 (11th Cir. 1994), *cert. denied*, 513 U.S. 1193, 115 S. Ct. 1258, 131 L. Ed. 2d 137 (1995); *see also Hess v. Mazurkiewicz*, 135 F.3d at 909 (remanding to the district court to consider whether petitioner's claim was fairly presented to the state courts).

The Court is are not required to resolve this issue concerning the veracity of Mr. Crow's testimony[35] because of the failure of post-conviction counsel to question Mr. Washington and Ms. Fatowe concerning the criminal representation of Mr. McCoy.[36] Moreover, the law is clear

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[35] The Court feels compelled to state, however, that there is no convincing evidence that Mr. Crow testified falsely on this issue. Given Mr. McCoy's central role in the events at issue, the Court is not surprised by the number of times Firm lawyers contacted Mr. McCoy or had meetings to discuss him. Moreover, even if it is assumed that Firm attorneys had conferences concerning Mr. McCoy in 1984 at which the criminal representation may have been raised, it does not follow that Mr. McCoy's failure to recall that representation in testimony given in 1989 was disingenuous.

[36] Indeed, Judge Turner had previously denied petitioner's motion to take discovery concerning this alleged conflict on the ground that petitioner could not establish cause for his failure to pursue the issue in state court. Judge Turner explained:

> Petitioner has not provided a sufficient reason for his failure to develop the record during the state proceedings. Crow, Washington and Fatowe were all witnesses during petitioner's state post-conviction proceedings. Petitioner's counsel asked Crow whether the firm had represented McCoy on a criminal charge and Crow answered that he was unaware of any such representation. Similar questions were not addressed to Washington or Fatowe. Thus, while the opportunity existed, petitioner simply failed to develop the record on this issue during the state court proceedings.

Order on Petitioner's Motion for Leave to Conduct Discovery at 3-4 (June 4, 1999) (footnote omitted) (Docket Entry 72). Despite this ruling by Judge Turner, petitioner's response to the partial summary judgment motion does not address the failure to question

that the conduct of post-conviction counsel, however negligent, cannot constitute cause to excuse any procedural default. *See Coleman v. Thompson*, 501 U.S. at 752-57; 28 U.S.C. § 2254(i); *see also Edwards v. Carpenter,* 529 U.S. 446, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (2000). Accordingly, the Court holds that petitioner has failed to show cause for the procedural default of his claim that trial counsel's criminal representation of Mr. McCoy constituted an actual conflict of interest.

Petitioner also argues that this Court may reach the merits of his conflict of interest claim, notwithstanding any procedural default, because he has raised a plausible claim of actual innocence. *See* P. Br. at 68-69.[37]

As previously noted, *see supra* page 34, a petitioner who has been sentenced to death may avoid a procedural bar to the consideration of the merits of his constitutional claim if he is

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Mr. Washington and Ms. Fatowe in state court about the criminal representation of Mr. McCoy.

[37] To the extent that Judge Turner's decision on petitioner's motion for leave to conduct discovery may be read to suggest that the "actual innocence" exception to the doctrine of procedural default does not survive the AEDPA, *see* Docket Entry 72 at 6, we respectfully disagree. Although the question may not have been resolved at the time of Judge Turner's death, the Supreme Court has recognized the actual innocence exception-although it has not been required to apply that rule-in at least one post-AEDPA decision. *See Edwards v. Carpenter*, 529 U.S. at 451 ("The one exception to that rule [that a prisoner demonstrate cause and prejudice for a procedural default], not at issue here, is the circumstance in which the habeas petitioner can demonstrate a sufficient probability that our failure to review his federal claim will result in a fundamental miscarriage of justice.") (citation omitted).

able to show that "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Schlup v. Delo*, 513 U.S. at 327.[38]

In support of his claim of actual innocence, petitioner notes that the only two people who could have committed the murder are himself and Mr. McCoy. *See* P. Br. at 68. Petitioner then states as follows:

> Mr. Johnson makes a preliminary showing that (1) a conflict of interest impaired his attorneys' ability to investigate whether Mr. McCoy committed the Connie Johnson homicide and to present evidence that he was the perpetrator of that crime; and (2) because Mr. McCoy and the State had a deal, his testimony that Mr. Johnson killed the victim is not trustworthy.

Id.[39] This does not even begin to satisfy the showing of actual innocence required by *Schlup*.

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[38] Petitioner cites *Kuhlmann v. Wilson*, 477 U.S. 436, 454, 106 S. Ct. 2616, 91 L. Ed. 2d 364 (1986), for the proposition that he need make only a colorable showing of factual innocence. *See* P. Br. at 68. Petitioner's brief appears to understate the burden on a petitioner. *See Schlup*, 513 U.S. at 322 ("The Kuhlmann plurality, though using the term 'colorable claim of factual innocence,' elaborated that the petitioner would be required to establish, by a "'fair probability,"' that "'the trier of the facts would have entertained a reasonable doubt of his guilt.'"") (*quoting Kuhlmann*, 477 U.S. at 455 n.17). In any event, the opinion in *Schlup*, which petitioner does not cite, laid to rest any doubt about the proper standard.

[39] The first part of petitioner's "preliminary showing" duplicates Claims 1(B)(1), (3), and (4). The substance of petitioner's claims is discussed at pages 96-99, 102-06, *infra*.

The evidence presented at trial of petitioner's guilt was strong. The Tennessee Supreme Court has stated that "the evidence to support the conviction of [Mr. Johnson] of murder in the first degree was legally sufficient beyond question." *State v. Johnson*, 743 S.W.2d at 157. Mr. McCoy testified that petitioner killed the victim outside his presence and that he and petitioner brought her body to the Mall of Memphis. Apart from that testimony, the State had other very significant evidence pointing to the petitioner's guilt. The defense did not challenge the evidence that the victim was killed at Force Camping Center. Petitioner was one of the few people at Force Camping at the time of the murder. Petitioner also admitted to the police that he was at the Mall of Memphis at about the same time that Mr. McCoy testified that the victim's body was transported to that location. No keys were found in the victim's van, and her only set of keys was later found in petitioner's truck. Petitioner gave two statements to the police accounting for his whereabouts the night of the murder. Virtually everything petitioner said in both statements was later revealed to be false. Notably, petitioner did not mention the fact that he drove Mr. McCoy back to the Penal Farm the night of the murder, a fact he cannot seriously dispute since the State introduced the log maintained by the Penal Farm, which indicates that petitioner signed Mr. McCoy in at 7:17 p.m. that night. That omission strongly suggests that petitioner did not want to lead the police to Mr. McCoy for fear of what he might tell them.

Petitioner has presented no new evidence of actual innocence, in the traditional sense.[40] Instead, he asserts that his testimony, which was offered only during the sentencing phase at trial, should have been presented during the guilt phase. Petitioner's testimony is, of course, not "new", since the jury heard it at the sentencing phase of the trial.[41]

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[40] The Supreme Court explained:

> To be credible, such a claim [of actual innocence] requires petitioner to support his allegations of constitutional error with new reliable evidence-whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence-that was not presented at trial.

Schlup, 513 U.S. at 324. It matters whether the evidence of innocence is "new", since the function of a habeas court is not to retry factual disputes that the jury apparently resolved against the petitioner. As the Supreme Court explained:

> Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim. However, if a petitioner . . . presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims.

Id. at 316.

[41] As is discussed at page 106, *infra*, the Court also finds that the admission of petitioner's testimony during the guilt stage of the trial would not have been helpful to him.

The remainder of petitioner's "new evidence" consists of questions trial counsel did not ask and evidence-most of which was available at petitioner's trial-that trial counsel did not use. None of this additional evidence tends to establish that Mr. McCoy committed the murder.[42] At best, the evidence would have permitted defense counsel to demonstrate on cross-examination of Mr. McCoy that he was mistaken about certain details related in his direct testimony (e.g., the time sequence the night of the murder, the location of the victim's van at Force Camping) and that his factual descriptions were sometimes not complete (e.g., whether the victim was dragged at least briefly, whether the trash bag was in the victim's mouth, the amount of blood on the sofa). Although this evidence may tend to undermine Mr. McCoy's powers of observation or description, it does not tend to demonstrate that Mr. McCoy was lying when he testified that petitioner murdered the victim.

Whether petitioner's evidence is considered separately or together, then, petitioner has not met his burden of showing that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence. Accordingly, the Court holds that petitioner has not made a sufficient showing of actual innocence to permit a decision on the merits of those claims that are subject to a procedural bar.

For similar reasons, petitioner cannot concede that his claim concerning the criminal representation of Mr. McCoy is new and seek an evidentiary hearing to develop the facts of

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[42] Moreover, as is set forth in detail in connection with Claim 2, *see infra* pages 112-17, the Court holds that petitioner has presented no credible evidence that the State entered into a "deal" with Mr. McCoy in exchange for his testimony.

that claim. Under the AEDPA, the discretion of a habeas court to hold an evidentiary hearing is limited:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that-
>
> (A) the claim relies on-
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2).

The Supreme Court recently held that, "under the opening clause of § 2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is a lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Williams v. Taylor*, 529 U.S. 420, 432, 120 S. Ct. 1479, 146 L. Ed. 2d 435 (2000). Here, petitioner's post-conviction counsel failed to ask each of the attorneys who represented him at or prior to trial whether they also

represented Ronnie McCoy. The Court finds that this failure constitutes a lack of diligence bringing petitioner's request for an evidentiary hearing within section 2254(e)(2). *See id.* at 437-40 (holding that petitioner's state habeas counsel was not diligent in developing his claim that a psychiatric report was withheld where references to such a report in the state-court record should have alerted counsel to the issue). Petitioner is therefore entitled to an evidentiary hearing on his conflict of interest claim only if he shows that the facts could not have been developed through due diligence and if petitioner has a convincing claim of innocence.[43]

Petitioner has not demonstrated that the facts underlying his claim concerning the criminal representation of Ronnie McCoy could not have been developed in state court. Although the Court assumes without deciding that Mr. Crow's testimony disclosing only the civil representation of Mr. McCoy would meet the statutory standard, petitioner does not attempt to suggest that questions addressed to Mr. Washington and Ms. Fatowe would not have proven fruitful. Indeed, the fact that Ms. Fatowe has provided an affidavit to petitioner's counsel strongly suggests that, if asked the question in state court, she would have testified about her prior representation of Mr. McCoy.

Moreover, for the reasons previously stated in connection with petitioner's claim of "actual innocence", the new evidence proffered by petitioner is insufficient to demonstrate

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[43] By contrast, a petitioner who has been diligent in attempting to develop the facts of his claim in state court but who was frustrated in his efforts to do so is not required to satisfy the requirements of § 2254(e)(2). *See id.* at 437.

by clear and convincing evidence that no reasonable factfinder would have convicted petitioner.

Accordingly, the Court holds that petitioner has not met the requirements of section 2254(e)(2) and is not entitled to an evidentiary hearing to develop his conflict of interest claim.[44]

d. Petitioner's showing that his defense was adversely affected by an actual conflict of interest

As previously noted, *see supra* pages 51-56, the factual record with respect to the three alleged conflicts of interest is far from fully developed. This failure to develop the record is significant because petitioner has, at most, alleged potential conflicts without providing the evidence necessary to show either that trial counsel actively represented competing interests or that such representation adversely affected their performance at trial.

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[44] Although the Court recognizes that two of the three members of the panel in *Abdur' Rahman v. Bell*, 226 F.3d 696 (6th Cir. 2000), believed that a district court has inherent discretion to hold an evidentiary hearing on a habeas petition, *see id.* at 704-06 (opinion of Siler, J.) (holding that pre-AEDPA court has inherent discretion; "While there may not be any inherent discretion to order an evidentiary hearing following the enactment of AEDPA, we decline to specifically determine whether AEDPA has so altered the law."); *id.* at 719 (Cole, J., concurring in part and dissenting in part), the Court agrees with Judge Batchelder that the applicable Supreme Court precedent does not appear to give habeas courts any such discretion, *see id.* at 715-18 (Batchelder, J., concurring).

With respect to Mr. Washington's representation of Ms. McKee in connection with her divorce, petitioner has failed to show any actual conflict of interest or that trial counsel failed to pursue a viable defense strategy because of any alleged conflict. Petitioner apparently contends that an actual conflict of interest occurs whenever an attorney is required to cross-examine a client, because "an attorney who cross-examines a former client inherently encounters divided loyalties." *Lightbourne v. Dugger*, 829 F.2d 1012, 1023 (11th Cir. 1987) (citations omitted), *cert. denied*, 494 U.S. 1039, 110 S. Ct. 1505, 108 L. Ed. 2d 640 (1988); *see* P. Br. at 37.[45] As previously noted, *see supra* pages 44-45, the Supreme Court has refused to impose a per se rule. In the absence of any evidence in the record concerning that representation, the Court is unable to conclude that trial counsel actively represented competing interests.[46]

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[45] Lightbourne's holding is not of assistance to petitioner. Although the Eleventh Circuit recognized that "whether or not an actual conflict arose [due to the cross-examination] presents a substantial question," 829 F.2d at 1023 (citation and footnote omitted), it found the factual record on that issue to be inconclusive, *see id.* at 1024. Moreover, the Court held that, "even if an actual conflict existed, petitioner has failed to allege such facts which, if proven, would demonstrate that the alleged conflict adversely affected petitioner's representation." *Id.*

[46] The Court does note that trial counsel expended considerable effort to exclude all testimony regarding petitioner's alleged extramarital sexual relationships, including a brief affair with Ms. McKee. *See* Addendum 1, Vol. 3, at 197-99. Such evidence may also have been potentially prejudicial to Ms. McKee in her divorce action, although the factual record does not permit any conclusions to be drawn in that regard. In any event, the interests of petitioner and Ms. McKee in this respect were consistent, not conflicting.

Petitioner also alleges that trial counsel failed to cross-examine Ms. McKee concerning her interest in obtaining a monetary reward from Crime Stoppers. *See* Petition at 23-24. There is no evidence in the record that Ms. McKee had any such interest and, even if there were, petitioner does not demonstrate that trial counsel possessed that information.[47] Moreover, even if Ms. McKee was motivated in whole or in part by the hope of a reward when she contacted the police with her information, that fact does not appear to be sufficiently impeaching of Ms. McKee's credibility so as to make the omission of that line of inquiry from the cross-examination rise to the level of an adverse effect on petitioner's representation. Petitioner also does not explain how Ms. McKee's hope of obtaining a monetary award from Crime Stoppers would prejudice her in her divorce action. He must, of course, make this connection in order to demonstrate counsel's motivation for holding back during cross-examination.

Ms. McKee's testimony provided the State with two pieces of information: first, that petitioner visited her the evening of the murder and asked her out for drinks and, second, that petitioner was wearing a blue plaid shirt similar to the shirt seized by the police. In light of petitioner's admission to the police that he met with Ms. McKee, petitioner does not even attempt to argue that trial counsel could have done anything to undermine Ms. McKee's testimony concerning the incident. Moreover, contrary to petitioner's allegations, Mr. Crow did cross-examine Ms. McKee at length in an attempt to cast doubt on her testimony

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[47] Indeed, the Petition also alleges that prosecutors withheld the identical information from the defense. *See* Petition at 29.

concerning the plaid shirt. *See infra* pages 107-08.[48] In short, petitioner has not even come close to establishing either of the *Cuyler* elements here. The Court therefore grants summary judgment to respondent on this claim.

With respect to Mr. Crow's brief representation of Mr. McCoy in connection with an automobile accident, petitioner has utterly failed to show any actual conflict of interest. Mr. Crow's testimony that he terminated his representation of Mr. McCoy after learning he would be a trial witness is uncontradicted. There is no evidence that Mr. Crow received any confidential information from Mr. McCoy during that brief representation. Petitioner does not attempt to prove that any of the alleged deficiencies in the cross-examination of Mr. McCoy were motivated, in whole or in part, by any sense of loyalty arising from this civil representation. There is, in short, absolutely no evidence establishing either element of the *Cuyler* standard. The Court therefore grants summary judgment to respondent on this claim.[49]

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[48] For this reason, this case is not similar to *Rosenwald v. United States*, 898 F.2d 585 (7th Cir. 1990), a pre-AEDPA decision in which the Seventh Circuit remanded for an evidentiary hearing concerning whether a defense attorney's simultaneous representation of a potential witness on an unrelated civil matter induced the attorney to persuade petitioner to plead guilty in order to avoid having to cross-examine his client.

[49] Moreover, as respondent notes, *see* Answer at 23-24, petitioner did not raise this argument in state court, preferring to argue that the civil representations of Ms. McKee and Mr. McCoy constituted per se violations of the Sixth Amendment. Accordingly, the Court holds that petitioner has procedurally defaulted with respect to his claim that he was actually prejudiced by the alleged conflicts of interest.

Petitioner's allegations with respect to Ms. Fatowe's criminal representation of Mr. McCoy are the most substantial, although, as previously noted, this claim is subject to a procedural default. Moreover, although the factual record is not sufficiently developed to permit definitive conclusions, the record before this Court does not support a conclusion that trial counsel actively representing competing interests. Although petitioner insists that Mr. McCoy made a "deal" with the State in exchange for his testimony, there is no allegation that trial counsel represented Mr. McCoy in connection with his role in Mrs. Johnson's death. In addition, although the Court recognizes that the apparent criminal representation of Mr. McCoy was very close in time to petitioner's arrest, it had apparently terminated at the time of the murder. The fact that Ms. Fatowe had negotiated a plea agreement for Mr. McCoy that resulted in his assignment to a work release program does not mean that defense counsel had any obligation-ethical or otherwise-to protect Mr. McCoy's work release status in the event he committed subsequent criminal acts. *See*, *e.g.*, *Vega v. Johnson*, 149 F.3d 354, 358 (5th Cir. 1998) (noting that, once a representation has terminated, the ethical duty of loyalty does not restrict the actions of an attorney toward a former client; "Qnce the matter ended, Kimbrough's only duty was to protect confidential information he received in his capacity as attorney."), *cert. denied*, 525 U.S. 1119, 119 S. Ct. 899, 142 L. Ed. 2d 899 (1999).

Moreover, the record suggests that Mr. McCoy was subjected to a vigorous cross-examination. Contrary to the allegations in the Petition, Mr. Crow devoted considerable effort to impeaching Mr. McCoy's testimony concerning the time sequence of events at the time of the murder. *See* Addendum 1, Vol. 4, at 374-75, 376-80. Mr. Crow also brought out the fact that, when he contacted Mr. McCoy on

two occasions in December, 1984, Mr. McCoy falsely stated that he knew nothing about Mrs. Johnson's death. *See id.* at 383-84. Defense counsel established that Mr. McCoy was serving a sentence at the Shelby County Penal Farm for attempted burglary and false reporting, *see id.* at 384-86, and brought out the fact that the false reporting charge consisted of "having made a false statement to the police," *id.* at 386. Mr. McCoy was also questioned about his prior criminal record, which involved armed robbery and burglary. *See id.* at 386. With respect to the existence of a "deal", Mr. Crow established that Mr. McCoy was not charged with any crime for his participation in the disposal of Mrs. Johnson's body, *see id.* at 387, and that Mr. McCoy was not taken off work release, *see id.* at 375.[50]

Likewise, Mr. Crow's description in summation of Mr. McCoy and his testimony was scathing. *See* Addendum 2, at 41-44. Although Mr. Crow did not take the position that Mr. McCoy was the *only* alternative suspect in the murder of Mrs.

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[50] The various Courts of Appeals have assigned vastly different weights to the apparent vigor of a cross-examination. Compare, e.g., *Simmons v. Lockhart*, 915 F.2d at 379-80 (finding no adverse effect where the attorney "cross-examined Davis every bit as vigorously as a lawyer without an arguable conflict would have done") with *Church v. Sullivan*, 942 F.2d at 1512 ("The dangers inherent in successive and multiple representations do not become apparent merely by scrutinizing what the attorney did: 'representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing.' . . . The apparent 'vigor' of cross-examination is but one factor to be considered in determining whether a conflict adversely affected counsel's performance.") (citation omitted). As previously noted, *see supra* pages 45-46, the Court is not required to take a position on this issue.

Johnson, *see id.* at 44,[51] he certainly argued that Mr. McCoy could have committed the murder, *see id.* at 43. He emphasized the facts that "Mrs. Johnson's checkbook, diamond rings, and money, was not found, nor were credit cards," *id.*, and that Mr. McCoy was "[a] convicted robber" and "burglar" with a "long outstanding criminal record," *id.*

The Court recognizes that Mr. Crow did not argue in summation that Mr. McCoy had entered into a deal with the State, although there is very little evidence in the record from which such an argument could have been made. The Court also realizes it does not have the benefit of Mr. Crow's testimony concerning his strategic decisions on cross-examination and during closing argument. Nonetheless, from the evidence in the record, the Court is unable to speculate that Mr. Crow's strategic decisions were influenced in any way by Ms. Fatowe's alleged criminal representation of Mr. McCoy. In the absence of such evidence, petitioner cannot establish an adverse effect on his defense and would not be entitled to relief.

For all the foregoing reasons, the Court grants summary judgment to respondent on this claim.

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[51] Although it now is clear that the murder could only have been committed by petitioner or Mr. McCoy, the position taken by trial counsel is not unreasonable when viewed from the perspective of the close of the guilt phase of the trial. Petitioner did not testify until the sentencing phase and, therefore, the jury did not have petitioner's admission that he transported his wife's body to the Mall of Memphis. Moreover, there was evidence in the record-including the facts that the victim's top was pulled up above her breasts and her purse was not found-that could support an alternative theory.

2. The ineffective assistance of trial counsel claim

In his brief in response to the summary judgment motion, petitioner takes the position that, even if his allegations of conflicts of interest have been procedurally defaulted, Claim 1 also presents a general claim of ineffective assistance of counsel. *See* P. Br. at 58 n.6. This assertion is not necessarily clear from the face of the Petition and, in fact, respondent's Answer apparently assumed that Claim 1 alleged only a conflict of interest claim. Nonetheless, because the Court is unwilling to lightly hold that petitioner has abandoned the claim that formed the basis for the state post-conviction proceeding-particularly in the absence of an objection by respondent in his reply brief-the Court elects to treat Claim 1 as alleging, in the alternative, a general claim of ineffective assistance of trial counsel.

a. The legal standards for evaluating claims that trial counsel did not render effective assistance

A claim that ineffective assistance of counsel has deprived a habeas petitioner of his Sixth Amendment right to counsel is controlled by the standards enunciated in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984):

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

In order to demonstrate deficient performance by counsel, a petitioner must demonstrate that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688.

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under

> the circumstances, the challenged action "might be considered sound trial strategy." . . . .

Id. at 689 (citations omitted); *see also Coe v. Bell*, 161 F.3d 320, 342 (6th Cir. 1998) ("The specifics of what Coe claims an effective lawyer would have done for him are too voluminous to detail here. They also largely miss the point: just as (or more) important as what the lawyer missed is what he did not miss. That is, we focus on the adequacy or inadequacy of counsel's actual performance, not counsel's (hindsight) potential for improvement."), *cert. denied*, 528 U.S. 842, 120 S. Ct. 110, 145 L. Ed. 2d 93 (1999) (citation omitted); *Adams v. Jago*, 703 F.2d 978, 981 (6th Cir. 1983) ("a defendant 'has not been denied effective assistance by erroneous tactical decisions if, at the time, the decisions would have seemed reasonable to the competent trial attorney'") (citations omitted).

A prisoner attacking his conviction bears the burden of establishing that he suffered some prejudice from his attorney's ineffectiveness. *See Lewis v. Alexander*, 11 F.3d 1349, 1352 (6th Cir. 1993); *Isabel v. United States*, 980 F.2d 60, 64 (1st Cir. 1992). "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant." *Strickland*, 466 U.S. at 697. If a reviewing court finds a lack of prejudice, it need not determine whether, in fact, counsel's performance was deficient. *See id.* at 697.

To demonstrate prejudice, a petitioner must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Additionally, however, in analyzing prejudice,

> the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of the challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated.

Lockhart v. Fretwell, 506 U.S. 364, 368, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993) (*citing United States v. Cronic*, 466 U.S. 648, 658, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)); *see also Strickland*, 466 U.S. at 686 ("The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."). "Thus analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." *Lockhart*, 506 U.S. at 369.

b. Procedural default

The substantive allegations of ineffective assistance of counsel at the guilt stage of the trial encompass more than ten pages of the Petition and consist of a laundry list of (a) claims that were exhausted in state court and are therefore properly before this Court; and (b) claims that were not presented at trial or in the first post-conviction proceeding and are, therefore, procedurally barred. Petitioner's allegations in this regard must first be categorized. Next, petitioner's various contentions as to why this Court is entitled to consider certain of the claims in category (b) must be addressed.

Claims that were exhausted in state court. The following claims were properly exhausted:

(a) Trial counsel was ineffective for failing to challenge Mr. McCoy's testimony that no deal existed for his testimony. *See* Petition at 15.[52]

(b) Trial counsel did not present evidence that a witness, Mrs. Janice Pugh, selected an individual resembling Ronnie McCoy, rather than petitioner, in a lineup. Mrs. Pugh had told the police that she saw a man walking away from a van parked in the Mall of Memphis parking lot at the time the State asserted petitioner parked it there. *See* Petition at 20.

(c) Trial counsel did not effectively challenge the State's assertion that petitioner had motive to kill Mrs. Johnson because his marriage to her was troubled and petitioner did not want to lose marital property in a divorce. Petitioner's family and friends could have testified that at the time of Mrs. Johnson's murder, petitioner and Mrs. Johnson had a happy and stable marriage. *See* Petition at 21.

(d) Trial counsel did not present the testimony of petitioner's nephew, Jeff Ward, who could have testified that the blood on a bandana seized from petitioner's truck was his and that the blood came from a leg injury Mr. Ward sustained while riding off-road vehicles with petitioner. *See* Petition at 21.

(e) Trial counsel failed to object when the prosecutor informed petitioner's jury in closing argument that he believed Mr. McCoy's testimony. *See* Petition at 24.

(f) Trial counsel failed to have a hearing on its motion to suppress petitioner's two statements to the police and, as a

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[52] *See* Addendum 13, Vol. 2, at 131-32 (testimony of petitioner); Addendum 19, at 38; Addendum 31, at 39.

result, petitioner's statements were entered into evidence against him. *See* Petition at 24.

(g) Trial counsel failed to seek the suppression of evidence based on the grounds recounted under Claim 7. *See* Petition at 24.

(h) Trial counsel did not rehabilitate jurors who expressed reservations about capital punishment. *See* Petition at 25.

(i) Trial counsel failed to challenge Memphis Police Officer Douglas's testimony that petitioner did not consent to a search of his truck. *See* Petition at 26.

(j) Trial counsel failed to order the trial transcript to aid in the drafting of a new trial motion. *See* Petition at 26.[53]

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[53] There exists another category of claims with respect to which petitioner's allegations about what trial counsel did or failed to do are factually inaccurate. For example, the Petition alleges the following:

> (a) that trial counsel did not challenge Mr. McCoy's testimony that he picked up the front of Mrs. Johnson, petitioner picked up her feet, and the two carried Mrs. Johnson into the van in which she was found. This testimony was in conflict with crime scene reports and photographs demonstrating that the toes of stockings Mrs. Johnson wore had been torn and the toes of Mrs. Johnson had been scraped, indicating that Mrs. Johnson's body had been dragged after her death. *See* Petition at 17-18. In fact, there was evidence in the record concerning the condition of the victim's toes and stockings. *See infra* page 126.
>
> (b) that trial counsel did not challenge Mr. McCoy's testimony that prior to Mrs. Johnson's murder, petitioner

had pulled her van up to the Sales Office. Trial witnesses testified that at or around the time of the murder, they did not see Mrs. Johnson's van parked anywhere near the Sales Office. *See* Petition at 18. As even the Petition notes, there was evidence in the record concerning the location of the victim's van near the time of the murder. *See infra* page 119.

(c) that trial counsel did not challenge Mr. McCoy's testimony that he clocked out of work at Force Camping at 6:45 p.m., spent five to eight minutes to perform a chore, returned to the Sales Office, helped petitioner place Mrs. Johnson's body in a van, helped petitioner clean up the Sales Office, drove petitioner's truck to the Mall of Memphis, and rode with petitioner from the Mall of Memphis to the Shelby County Penal Farm where he was checked in at 7:17 p.m. Given the physical distances between Force Camping, the Mall of Memphis, and the Shelby County Penal Farm, such a chain of events was impossible to have occurred between 6:45 p.m. and 7:17 p.m. *See* Petition at 18. In fact, as previously noted, trial counsel did bring out the improbabilities in the time sequence of events on cross-examination of Mr. McCoy. *See supra* page 71.

(d) that trial counsel did not challenge Mr. McCoy's statement to the police that after petitioner parked the van in the Mall of Memphis parking lot, he got into his truck, and, at that time, the key ring that contained the keys to the van contained 10 to 15 keys. Mrs. Johnson's key ring contained four keys. *See* Petition at 18-19. In fact, trial counsel impeached Mr. McCoy's trial testimony concerning the keys with his prior inconsistent statement. *See infra* page 120.

(e) that trial counsel did not follow up on information possessed by Mr. McCoy's girlfriend, Karen Gilbert, who

Claims that were not raised in state court. The following claims were not fully and fairly presented to the state courts and are, therefore, procedurally barred:

(a) Trial counsel did not confront Mr. McCoy with his preliminary hearing testimony that when petitioner first showed him Mrs. Johnson's body, there was a trash bag laying across her face and chin that "was near her mouth." This testimony was in conflict with 1) Mr. McCoy's testimony that when petitioner first showed him Mrs. Johnson, she was dead; 2) testimony of the State's expert that Mrs. Johnson died as the result of suffocation that occurred when a plastic bag was stuffed into her mouth; and 3) crime scene photographs demonstrating that virtually all of the trash

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was at Force Camping at the time of the murder. *See* Petition at 20. In fact, Mr. Crow testified extensively at the hearing on the first post-conviction petition concerning his extensive, albeit unsuccessful, efforts to interview Ms. Gilbert. *See infra* page 93.

(f) that trial counsel did not challenge Ms. McKee's testimony that when petitioner visited her at the Rip Van Winkle Motel the night of Mrs. Johnson's murder, he wore a plaid shirt on which the State's expert identified human blood and did not call witnesses who could have testified that petitioner did not wear a plaid shirt at the time the State asserted Mrs. Johnson was killed, but, rather, at that time was wearing a single color work uniform shirt. *See* Petition at 23. In fact, trial counsel did challenge that testimony. *See infra* pages 107-08.

Because of this evidence in the trial court record, the Court is unable to hold that trial counsel was constitutionally ineffective for failing to do any of these things.

bag was stuffed into Mrs. Johnson's mouth. *See* Petition at 15-16.[54]

(b) Trial counsel did not challenge Mr. McCoy's testimony that when petitioner showed him Mrs. Johnson's body laying on a couch in the Force Camping Sales Office, a little blood had dripped onto the couch. This testimony was in conflict with crime scene photographs demonstrating that a head injury to Mrs. Johnson was so severe that a large pool of blood soaked through carpeting covering the floor of the van in which she was found and a rubber mat underneath that carpeting. *See* Petition at 16.

(c) An expert testified that while the couch contained human blood stains, there was not enough of a stain sample to type the blood. This testimony was in conflict with Mr. McCoy's testimony that petitioner showed him Mrs. Johnson's body on the couch in the Force Camping Sales Office. Crime scene photographs demonstrate that, because a head injury to Mrs. Johnson was severe, if Mrs. Johnson's body had been placed on the couch it would have deposited an amount of blood sufficient for the State's expert to type it. *See* Petition at 16-17.

(d) Trial counsel did not challenge Mr. McCoy with his inconsistent testimony. Mr. McCoy testified that when petitioner showed him Mrs. Johnson's body, Mr. McCoy asked, "Why did you do it?" This testimony was inconsistent with Mr. McCoy's testimony that, prior to Mrs. Johnson's murder, petitioner informed Mr. McCoy that 1) he and his

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[54] Although this claim was raised at the trial court, *see* Addendum 13, Vol. 2, at 115 (testimony of petitioner), it was not preserved on appeal, *see* Addendum 19.

wife were having marital difficulties; 2) Mrs. Johnson indicated she was going to divorce petitioner; 3) petitioner had previously been divorced and his ex-wives had obtained large portions of marital property; 4) petitioner was not going to let that happen again; and 5) petitioner had therefore decided to kill Mrs. Johnson at Force Camping. *See* Petition at 17.

(e) Trial counsel did not investigate and present evidence respecting petitioner's prior divorces. *See* Petition at 17.

(f) Trial counsel did not investigate petitioner's membership in any "motorcycle gang." *See* Petition at 19.[55]

(g) Trial counsel failed to confront Mr. McCoy with his entire criminal record. *See* Petition at 19.[56]

(h) Trial counsel did not present evidence that the impression of a hand found on the trash bag removed from Mrs. Johnson's mouth was inconsistent with an impression that petitioner's hand would make. *See* Petition at 19-20.[57]

(i) Trial counsel did not challenge Mr. McCoy's testimony that he did not inform authorities that petitioner killed Mrs.

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[55] This claim was raised in the trial court, *see* Addendum 13, Vol. 2, at 96, 133 (testimony of petitioner), but was abandoned on appeal, *see* Addendum 19.

[56] This claim was also raised in the trial court, *see* Addendum 13, Vol. 2, at 113 (testimony of petitioner); *id.*, Vol. 3, at 225-26 (testimony of Jeff A. Crow, Esq.), but not on appeal, *see* Addendum 19.

[57] Again, this claim was not pursued on appeal.

Johnson because he was afraid of petitioner because petitioner had been a member of a "motorcycle gang", petitioner carried a gun, petitioner had "an attitude", and petitioner beat up a man named Jeff Spencer. Mr. McCoy had previously stated to police that he did not come forward because he was afraid of being prosecuted and put in jail, not because he was scared of petitioner. *See* Petition at 19.

(j) Trial counsel did not present at the guilt stage petitioner's testimony that Mr. McCoy killed Mrs. Johnson. See Petition at 20.

(k) Trial counsel did not challenge the State's assertion that the trash bag found in Mrs. Johnson's mouth was a unique type of trash bag that Force Camping used in its Sales Office. *See* Petition at 21.

(l) Trial counsel did not challenge the testimony of Mr. James Force that when he discovered Mrs. Johnson's van parked at the Mall of Memphis, he looked into the van window and saw that Mrs. Johnson's blouse had been pulled up over her body. Crime scene photographs, the crime scene diagram, and police reports demonstrate that a full length coat covered Mrs. Johnson's body, and the only parts of her body that were visible were the top of her head and her feet. *See* Petition at 21-22.

(m) Trial counsel did not introduce evidence explaining why a hair brush found in petitioner's truck was similar to a hair brush Mrs. Johnson carried the day she was murdered. Petitioner's mother could have testified that she was a beautician, bought identical hair brushes in bulk, and gave Mrs. Johnson many of them. Petitioner's family members could have testified that Mrs. Johnson, at times, drove petitioner's truck, and she kept in the truck personal items

such as one of the hair brushes petitioner's mother gave her. *See* Petition at 22.

(n) Trial counsel did not present evidence that Mall of Memphis security personnel noted that on December 8, 1984, after 10:00 p.m., the windows to Mrs. Johnson's van were fogged up. *See* Petition at 22.

(o) After the State rested, trial counsel informed petitioner's jury that petitioner had decided to exercise his right not to testify. *See* Petition at 23.[58]

(p) Trial counsel's conflicts of interest prejudiced petitioner in that trial counsel could not effectively investigate, present evidence, and argue that, in return for Ms. McKee's testimony against petitioner, the State agreed not to engage in any activity that could affect the divorce proceeding in which Mr. Washington represented Ms. McKee. *See* Petition at 23.

(q) Trial counsel did not present evidence that Ms. McKee hoped to receive a monetary reward from Crime Stoppers upon petitioner's conviction. *See* Petition at 23-24.

(r) Trial counsel did not have the trial court strike for cause prospective jurors Leona A. Payne and Chester Cranford. *See* Petition at 24-25.[59]

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[58] At the first post-conviction proceeding, petitioner alleged only that trial counsel failed to adequately advise him concerning the decision whether to testify at trial. *See* Addendum 13, Vol. 1, at 37-38 (ground x); *id.*, Vol. 2, at 141 (testimony of petitioner).

[59] The issue of procedural default with respect to Ms. Payne is discussed in connection with Claim 4. *See* infra pages 133-34. With respect to Mr. Cranford, post-conviction counsel did nothing more

(s) Trial counsel failed to move for a change of venue to a judicial district where there had been less publicity respecting Mrs. Johnson's murder than the publicity the murder had received in the Shelby County area. *See* Petition at 25.

(t) Trial counsel failed to move for individual sequestered *voir dire* when it became apparent that group *voir dire* informed prospective jurors that they could avoid jury service by declaring opposition to the death penalty, and prospective jurors began declaring such opposition. *See* Petition at 25-26.[60]

(u) Trial counsel failed to object to unconstitutional jury instructions, including the trial court's instructions that if the jury finds a killing occurred, a presumption arises that the killing was malicious; that intent or design to kill may be conceived and deliberately formed in an instant, and a person may deliberate although controlled to a ~~large extent~~ by passion; that equated the concept of reasonable doubt with moral certainty; and that the law presumes that witnesses testify truthfully. *See* Petition at 26.

Claims that were raised in the successive post-conviction petition. As previously mentioned, *see supra* page 35, section 40-30-111 of the Tennessee Post-Conviction Procedure Act prohibits a post-conviction court from considering claims raised by a petitioner that had been previously determined or

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than read into the record his testimony on *voir dire* that he was exposed to certain pretrial publicity and had formed a preliminary opinion. *See* Addendum 13, Vol. 3, at 256-59 (testimony of Jeff A. Crow, Jr., Esq.). The issue was not pursued on appeal.

[60] Although claims (r), (s), and (t) were raised at the trial-court level, they were abandoned on appeal.

waived. A ground is "waived" "if the petitioner knowingly and understandingly failed to present it for determination." Tenn. Code Ann. § 40-30-112(b)(1). The trial court dismissed the successive post-conviction petition on this basis, *see* Addendum 41, Vol. 1, at 129-31; *see also supra* pages 17-18, and the Tennessee Court of Criminal Appeals reversed, holding that the presumption of waiver could be rebutted by evidence that post-conviction counsel refused to present issues that petitioner had identified, *see* Addendum 44; *see also supra* pages 18-19. The Tennessee Supreme Court thereafter reversed that decision for reconsideration in light of *House v. State*, 911 S.W.2d 705 (Tenn. 1995), *cert. denied*, 517 U.S. 1193, 116 S. Ct. 1685, 134 L. Ed. 2d 787 (1996), *see* Addendum 47; *see also supra* pages 19-20, and, on remand, the Tennessee Court of Criminal Appeals held that the new claims contained in the successive post-conviction petition were waived, *see* Addendum 52; *see also supra* page 20.

Petitioner urges this Court hold that the waiver decision of the Tennessee Court of Criminal Appeals does not constitute an adequate state-law ground because it was not clearly established at the time of the purported default. *See* P. Br. at 43-47. As petitioner recognizes, however, the Sixth Circuit expressly rejected a similar claim in *Coe v. Bell*, 161 F.3d at 331. *See* P. Br. at 47 n.5. Unlike *Coe*, the Court of Criminal Appeals held that petitioner had made allegations that, if proven, would rebut the presumption of waiver. *See id.* However, on reconsideration, the Tennessee Court of Criminal Appeals specifically declined to hold that the rule enunciated in House was "new":

> As for his constitutional claims, the petitioner's premise--that the post-conviction waiver standard in Tennessee was a personal one before House--is rather weak. We believe that there was no clear indication

> before House that the statute was interpreted to require personal waiver. In fact, as House indicates, the relevant case history reflects the opposite. 911 S.W.2d at 713; *see, e.g., State v. Miller*, 668 S.W.2d 281 (Tenn. 1984); *Arthur v. State*, 483 S.W.2d 95 (Tenn. 1972); *Holiday v. State*, 512 S.W.2d 953 (Tenn. Crim. App. 1972). Thus, as this court has previously noted, "House may very well represent a clarification of, as opposed to a change in, the law." *Melson v. State*, No. 02C01-9402-CR-00023, Madison County, *order denying rehearing* at 2 (Tenn. Crim. App. July 28, 1996). Under these circumstances, there is no constitutional problem with the application of House to this case.

Addendum 52, at 6. As this Court has previously noted, the initial decision of the Tennessee Court of Criminal Appeals in petitioner's case represented an unsuccessful effort by that Court to reinterpret Tennessee's waiver rules. *See Alley v. Bell*, 101 F. Supp.2d 588, 624-26 (W.D. Tenn. 2000). In the absence of evidence that the state courts previously applied a subjective standard for evaluating claims of waiver, the Court cannot consider the claims raised for the first time in the successive post-conviction petition. *See Dugger v. Adams*, 489 U.S. 401, 410 n.6, 109 S. Ct. 1211, 103 L. Ed. 2d 435 (1989).

The denial of petitioner's requests to represent himself. Petitioner further argues that the failure of the state courts to permit him to represent himself constitutes cause for his procedural default. *See* P. Br. at 21-24. At the time of the filing of the first post-conviction petition, the Tennessee Post-Conviction Procedure Act provided for the appointment of counsel to represent indigent petitioners who asserted arguably meritorious claims. *See* Tenn. Code Ann. § 40-30-

121; *see also Swanson v. State*, 749 S.W.2d 731 (Tenn. 1988). Petitioner cites statutory provisions relating to the right of indigent criminal defendants to represent themselves at trial and on direct appeal, *see* Tenn. Code Ann. § 40-14-202(a), and argues that the Post-Conviction Procedure Act incorporated those provisions by reference and thereby created a statutory right for post-conviction petitioners to waive the assistance of counsel. *See* P. Br. at 23-24.

Petitioner ignores the fact that the Tennessee courts have not interpreted the Post-Conviction Procedure Act as creating such a right. In upholding the trial court's dismissal of the second post-conviction petition, the Tennessee Court of Criminal Appeals found that the Tennessee appellate courts had already at least implicitly rejected the very argument urged by petitioner here. *See* Addendum 52, at 5-6. Indeed, the Court of Criminal Appeals expressly stated that no such statutory right exists:

> We also note that this court has previously held that there is neither a constitutional nor a statutory right for a post-conviction petitioner to represent him or herself. *Cole v. State*, 798 S.W.2d 261, 263 (Tenn. Crim. App. 1990). Although Cole indicates a common law right to self-representation exists, we do not believe it is a fundamental right. In fact, given the nature of a post-conviction proceeding, including the typical imprisonment of the petitioner at a site distant from the forum court which necessarily limits investigative capability and nonevidentiary-hearing court appearances, we do not believe that a trial court is barred from appointing counsel if necessary to aid in the proper administration of justice. *See, e.g., State v. Reeves*, 610 S.W.2d 730, 731 (Tenn. Crim. App. 1980).

Id. at 6 n.4. This Court is required to defer to state-court interpretations of state law.[61] Accordingly, the Court cannot consider the state-court's refusal to permit petitioner to represent himself to constitute cause that would excuse his procedural default.[62]

For the foregoing reasons, then, the Court holds that petitioner has procedurally defaulted each of the claims set forth in category (b), *supra*.[63]

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[61] As previously noted, *see supra* page 21, the Tennessee Supreme Court denied petitioner permission to appeal this decision. *See* Addendum 55. Moreover, as respondent notes, Tennessee has regularly followed the rule that courts will not consider pro se pleadings when criminal defendants or post-conviction petitioners are represented by counsel. *See State v. Burkhart*, 541 S.W.2d 365 (Tenn. 1976) (holding that criminal defendants do not have the right to be represented by counsel and to participate in their own defense); *Smith v. State*, 757 S.W.2d 14, 16 (Tenn. Crim. App. 1988) (same); *Harris v. State*, 1998 Tenn. Crim. App. LEXIS 479, No. 03C01-9611-CR-00410, 1998 WL 191441, at *18 (Tenn. Crim. App. Apr. 23, 1998) (refusing to consider pro se brief filed by post-conviction petitioner); *State v. Muse*, 637 S.W.2d 468, 470 (Tenn. Crim. App. 1982) (refusing to consider pro se motion); *see* also Reply to Petitioner's Response to Respondent's First Motion for Summary Judgment ("R. R. Br.") at 6.

[62] Because petitioner has no Sixth Amendment right to counsel at state post-conviction proceedings, the Court agrees with respondent that he does not have a federal constitutional right to represent himself. *See* R. R. Br. at 6-7.

[63] Petitioner also complains that he did not receive a full and fair hearing on his first post-conviction petition because the trial

court judge refused to permit him to introduce certain evidence. In particular, the trial judge (i) refused to permit the testimony of Terry Ramos, the Mall of Memphis security guard who found the victim's body, concerning the condition of the victim's stockings and toes, *see* Addendum 13, Vol. 2, at 36-39; (ii) refused to permit an investigator from the Shelby County Public Defender's Office to testify concerning his attempt to reconstruct the time sequence of events the evening of the murder, *see id.* at 39-41; (iii) refused to hear the testimony of Barry Pfister, a Force Camping employee, that he did not see David Force or Ron McCoy at the time he clocked out the evening of the murder, *see id.*, Vol. 4, at 347-49; and (iv) refused to permit records of the Shelby County Penal Farm to be introduced that would show that Mr. McCoy was not disciplined for returning late the evening of the murder, *see id.* at 350-56. *See* P. Br. at 12-14. As previously noted, *see supra* page 79 n.53, there was ample evidence in the trial-court record concerning the condition of the victim's stockings and toes, and trial counsel did attempt to impeach Mr. McCoy's testimony concerning the time sequence of events. Moreover, petitioner does not explain why the testimony of Mr. Pfister would have been significantly helpful to him, since there appears to be no dispute that Mr. McCoy was at Force Camping at the time of the murder even if Mr. Pfister did not see him. The trial court's exclusion of this evidence does not seem unreasonable. The only arguably meritorious objection concerns the exclusion of the Penal Farm records, which petitioner contended were relevant to the existence of a deal between the State and Mr. McCoy. As is discussed at length in connection with Claim 2, *see infra* pages 112-17, however, the Court holds that the State did not make a deal for Mr. McCoy's testimony.

As previously noted, *see supra* page 14, petitioner filed a pro se brief with the Tennessee Supreme Court in connection with the appeals of the denial of his first post-conviction petition. *See* Addendum 36. Tennessee does not permit post-conviction petitioners who are represented by counsel to file pro se papers. *See supra* page 90 n.61. In any event, each of the issues raised in that

c. The merits of petitioner's ineffective assistance of trial counsel claim

As previously noted, *see supra* pages 74-75, in evaluating a claim that trial counsel were ineffective the proper focus is on what counsel did, not on what they failed to do. Each of the attorneys who represented petitioner at or prior to trial testified at the hearing on the first post-conviction petition. Defense counsel interviewed petitioner on several occasions. *See* Addendum 13, Vol. 3, at 187, 189, 190, 191-92, 195, 196, 197-98, 200, 201-02 (testimony of Jeff A. Crow, Jr., Esq.); id., Vol. 5, at 405-07, 408-09, 416, 417, 420-21, 422-24, 425, 426, 428-30, 446-48 (testimony of W. Clark Washington, Esq.).[64] Defense counsel also interviewed members of petitioner's family, including both his parents and his brother, James C. Johnson, in an effort to develop evidence. *See id.*, Vol. 3, at 188-89, 189-90, 192, 196-97, 198, 220-21, 223; *id.*, Vol. 5, at 409-10, 413, 415-16, 418-19, 422, 427-28.

Shortly after being retained, defense counsel interviewed Mr. McCoy, and they followed up with him (or at least

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pro se brief that is relevant to Claim 1 was also properly exhausted on direct appeal or in the first post-conviction proceeding.

[64] A copy of trial counsel's time records were introduced into evidence at the post-conviction hearing. *See id.*, Vol. 6, Exhibit 2. Messrs. Crow and Washington testified that the records are generally accurate, although both attorneys sometimes performed services that were not recorded. *See id.*, Vol. 3, at 179-80 (testimony of Mr. Crow); *id.*, Vol. 5, at 407-08, 413-14 (testimony of Mr. Washington).

attempted to do so) on several occasions thereafter. *See id.*, Vol. 3, at 217, 218; *see also id.* at 186, 187; *id.*, Vol. 5, at 410-11, 412, 414.[65] Defense counsel also expended considerable effort in attempting to locate various girlfriends or former girlfriends of Mr. McCoy in an effort to find out any information that would impeach his testimony. *See id.*, Vol. 3, at 189, 191, 192, 218. Defense counsel were particularly interested in interviewing a woman named Karen Gilbert, who was reportedly dating Mr. McCoy at the time of the murder. *See id.* at 194-95, 196, 218-20; *id.*, Vol. 5, at 421-22. Thus, defense counsel hired an investigator in an effort to locate Ms. Gilbert. *See id.*, Vol. 3, at 195, 221-22.[66]

In addition, defense counsel visited Force Camping on several occasions, *see id.* at 186, 197; *id.*, Vol. 5, at 419, and hired an investigator to take photographs of the crime scene, *see id.*, Vol. 3, at 186, 197, 222. They interviewed Mr. and Mrs. Force and several other Force Camping employees who may have been present at the time of the murder. *See id.* at 186, 187, 193, 197, 218; *id.*, Vol. 5, at 419-20. Defense counsel created diagrams of the crime scene. *See id.*, Vol. 3, at 186-87; *id.*, Vol. 5, at 419. They also attempted to recreate the time sequence of events the evening of the murder. *See id.* at 469, 470-71 (testimony of Leslie Fatowe, Esq.); *see also*

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[65] Once Mr. McCoy was identified as a witness for the State, he refused to speak to trial counsel. *See id.*, Vol. 3, at 217, 218.

[66] Counsel were not ultimately successful in their attempts to interview Ms. Gilbert. Mr. Crow testified that at one point he had made an appointment to meet with Ms. Gilbert at her apartment but she did not show up. *See id.* at 184, 196. Mr. Crow also testified that Ms. Gilbert's father threatened him with bodily injury if he did not leave Ms. Gilbert alone. *See id.* at 194-95.

id. at 440-41 (testimony of Washington).[67] Defense counsel also obtained discovery, *see id.*, Vol. 3, at 198-200; *id.*, Vol. 5, at 423, 424-25, and explored the possibility of a plea to a lesser charge, *see id.*, Vol. 3, at 200-01.

At trial, defense counsel apparently pursued a strategy of establishing that there was a reasonable doubt concerning petitioner's guilt.[68] In that regard, trial counsel brought out the fact that there was no blood evidence linking petitioner to the murder of his wife. *See* Addendum 1, Vol. 5, at 431 (testimony of Theresa Paulette Sutton). The State also conceded that it was unable to identify petitioner's fingerprints or handprints on the plastic bag taken from the victim's mouth or on the victim's van. *See* Addendum 1, Vol. 3, at 158 (testimony of Sergeant F.D. Brawner); *id.*, Vol. 4, at 404-08 (testimony of Andre Nagoski). As previously mentioned, *see supra* pages 71-72, trial counsel subjected Mr. McCoy to a vigorous cross-examination in an effort to undermine his credibility. In that regard, Mr. McCoy was closely examined concerning the time sequence of events, *see supra* page 71, and trial counsel introduced the testimony of a Force Camping employee who testified that he saw petitioner at Force Camping during the time Mr. McCoy claimed he was transporting the victim's body to the Mall of Memphis and returning him to the Penal Farm. *See* Addendum 1, Vol. 5, at 456-59 (testimony of Paul Adams). Trial counsel also attempted to undermine the credibility of

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[67] As is discussed at length in connection with Claim 6, *see infra* pages 140-48, defense counsel also advised petitioner not to submit to a polygraph and urged him not to give a statement to the police.

[68] Post-conviction counsel did not question trial counsel very extensively concerning the strategic decisions they made at trial.

the police officer who testified to a statement petitioner made to the police. *See id.*, Vol. 3, at 260-66 (testimony of Sergeant James D. Hodges). Trial counsel successfully rebutted the prosecution's claim that petitioner murdered his wife in order to collect on a $50,000 life insurance policy through the testimony of the insurance agent who had sold the policy. *See id.*, Vol. 5, at 464-73 (testimony of Kathy Criswell); *see also supra* page 7 n.4.

In addition, trial counsel objected to evidence that would be prejudicial to petitioner, including evidence concerning petitioner's alleged extramarital sexual relationships, *see supra* page 67 n.46, *infra* page 103, certain photographs of nude women that were found in petitioner's truck, *see infra* page 103, and testimony concerning petitioner's alleged membership in a motorcycle gang and an incident in which he allegedly beat up a man, *see infra* pages 97-99. Trial counsel also objected to the introduction of certain photographs of the victim that depict a large amount of blood. *See infra* page 161 n.119. A number of these objections were sustained. *See* Addendum 13, Vol. 3, at 203 (testimony of Mr. Crow). Moreover, trial counsel attempted to minimize the impact of prejudicial testimony that was admitted.[69]

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[69] Prior to trial, defense counsel repeatedly interviewed two women who were potential state witnesses with whom petitioner was said to have been sexually involved. *See* Addendum 13, Vol. 3, at 181-85, 188, 190, 192-93, 195, 196, 198, 218, 221, 223 (testimony of Mr. Crow); *id.*, Vol. 5, at 416, 417, 425 (testimony of Mr. Washington). One of these women, Debbie McKee, was a witness for the State. The State was unable to locate the other witness at the time of trial. *See id.*, Vol. 3, at 190. Trial counsel also investigated rumors that petitioner had once beat up a man. *See id.* at 193-94.

The Court does not, of course, mean to imply that the representation afforded petitioner was without error or that defense counsel could not have taken additional actions at or prior to trial. The Court does, however, hold that petitioner received reasonably effective assistance of counsel at the guilt stage of his trial. None of the alleged deficiencies set forth in Claim 1 of the Petition seriously undermine this conclusion.

Trial counsel's alleged failure to challenge Mr. McCoy's testimony. Petitioner alleges that trial counsel failed to impeach Mr. McCoy's testimony in various ways. Even if counsel's performance was deficient-and there is little evidence it was-petitioner cannot demonstrate that he was prejudiced by trial counsel's alleged errors.

Petitioner first complains that trial counsel did not challenge Mr. McCoy's testimony that he had not made any deal for his testimony. As is set forth at length in connection with Claim 2, *see infra* pages 112-17, this Court finds that there was no deal for Mr. McCoy's testimony. Under those circumstances, a decision to cross-examine Mr. McCoy on that issue could well have backfired, giving the State the opportunity to emphasize that Mr. McCoy received nothing of value in exchange for his testimony.

Petitioner alleges that trial counsel failed to confront Mr. McCoy with his entire criminal record. Although this issue was raised during the post-conviction hearing, *see* Addendum 13, Vol. 2, at 96, 133 (testimony of petitioner); *id.*, Vol. 3, at 225-26 (testimony of Jeff A. Crow, Jr., Esq.), petitioner has not provided any evidence that, at the time of his trial, Mr. McCoy had additional criminal convictions that would have been admissible in evidence.

Petitioner also complains that trial counsel did not bring out the fact that Mr. McCoy had given inconsistent explanations for his failure to inform authorities about his role in the victim's death. Contrary to petitioner's assertion, however, Mr. McCoy did not testify that he did not come forward with his knowledge concerning the murder because he was afraid of petitioner. Mr. McCoy testified during the guilt phase of the trial that he was afraid of petitioner because he belonged to a motorcycle club. *See* Addendum 1, Vol. 4, at 370. This testimony was offered as an explanation for why Mr. McCoy helped petitioner move the victim's body. *See id.* at 368.[70] In a statement given to the police several weeks after the homicide, Mr. McCoy stated that he had not previously come forward with his information because "I was scared, of getting prosecuted and put in jail, for something I

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[70] Although defense counsel clearly anticipated that this testimony would be elicited, *see id.*, Vol. 3, at 238-40, 243-46; Vol. 4, at 368-69, Mr. McCoy did not testify to any incident in which petitioner allegedly beat up a man.

Petitioner was asked about the incident on cross-examination during the sentencing phase of the trial. *See* Addendum 1, Vol. 5, at 518. This testimony was introduced to rebut petitioner's claim that

> I've never physically really hurt anyone in my knowledge in my life. I've been in a couple of fights, you might say, whereas the most thing would happen would be a wrestling match. I've never per se beat anyone up. I might have boasted many times that I have, you know. I've never beat anyone up. I've never physically assaulted anyone. I've never physically mained [sic] or hurt anyone, including my wife.

Id. at 515.

didn't want anything to do with." P. Br., Exhibit 32, at 5. In short, petitioner's assertion that Mr. McCoy gave conflicting explanations for his failure to contact the police is simply incorrect. Moreover, even if the statements are arguably inconsistent, it cannot be concluded that the failure of trial counsel to bring out the prior statement renders the result of petitioner's trial unreliable.

Petitioner complains that trial counsel did not investigate his alleged membership in a motorcycle gang and present evidence that that "gang" was a group of Christian men who profess sobriety and high morals. Petitioner has come forward with no evidence other than his own testimony that that is the case. *See* Addendum 13, Vol. 2, at 96.[71] The Court also cannot conclude that the failure to offer such evidence--if it existed--was sufficiently serious as to rise to the level of a Sixth Amendment violation.

Finally, as previously mentioned, *see supra* pages 62-63, the various additional inconsistencies in Mr. McCoy's testimony would have, at most, tended to undercut either Mr. McCoy's power of observation or his descriptive ability. None of the impeachment points offered by petitioner tends to establish that Mr. McCoy was lying when he testified that petitioner murdered Mrs. Johnson. Accordingly, petitioner cannot show that he was prejudiced by the failure of trial counsel to bring out these points.

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[71] The State attempted to impeach petitioner's testimony at the sentencing phase of the trial by bringing out his membership in a motorcycle gang. *See* Addendum 1, Vol. 5, at 516-17. The Court notes that petitioner did not at that time offer the information he testified to at the post-conviction proceeding.

Trial counsel's alleged failure to present evidence suggesting that Mr. McCoy murdered Mrs. Johnson. Petitioner alleges that trial counsel did not "effectively" present various evidence that he contends implicates Mr. McCoy in the murder. Whether considered separately or in the aggregate, this claim is without merit.

Petitioner first complains that trial counsel did not present evidence that a handprint found on the trash bag taken from the victim's mouth contained an impression that was inconsistent with petitioner's hand but consistent with that of Mr. McCoy. This claim is not supported by the record evidence. The State's fingerprint expert, Andre Nagoski, testified at trial that the prints on the bag were not compared to those of any person because they were of no value whatsoever. *See* Addendum 1, Vol. 4, at 406-07. Mr. Nagoski testified at the post-conviction proceeding that it was not possible even to determine the size of the handprint on the bag. *See* Addendum 13, Vol. 3, at 329-30.

Petitioner also alleges that trial counsel failed to introduce evidence that a lineup was conducted in which a witness, Janice Pugh, identified a person who resembled Mr. McCoy as the person she saw in the Mall of Memphis parking lot near the time of the murder. Trial counsel did bring out the fact that Mrs. Pugh did not identify petitioner. *See* Addendum 1, Vol. 3, at 300 (testimony of Sergeant James D. Douglas).[72]

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[72] Contrary to petitioner's assertions, Mrs. Pugh did not identify anyone in the lineup. *See* Addendum 13, Vol. 4, at 358 (testimony of Janice Pugh); *id.*, Vol. 5, at 442-44 (testimony of Mr. Washington); *see also id.* at 466-67 (testimony of Ms. Fatowe).

Moreover, the Court cannot conclude that petitioner was prejudiced by trial counsel's failure to suggest that the person Mrs. Pugh saw at the Mall of Memphis was Mr. McCoy. First, Mrs. Pugh's testimony at the post-conviction hearing leaves little doubt that the person she saw was not Mr. McCoy. Mrs. Pugh testified that the man she saw was wearing "a dress suit. It was a vest, dark pants, and a dark jacket thrown over this arm, and a white or a light-colored long sleeve dress shirt." Addendum 13, Vol. 4, at 361. Although the record does not indicate what Mr. McCoy wore the evening of the murder, the clothing described by Mrs. Pugh seems an unlikely choice for a man who spent the day working at a camping center before returning to the Penal Farm.[73] Moreover, Mrs. Pugh testified that she saw the man in question at 6:30 p.m., *see* Addendum 13, Vol. 4, at 359-60, which is prior to the time Mr. McCoy and petitioner were at the Mall of Memphis, see Addendum 1, Vol. 4, at 358, 359, 376-79 (testimony of Mr. McCoy); *State v. Johnson*, 743 S.W.2d at 155-56 (finding that the time of death was between 6:30 and 7:00 p.m.).

Second, Mrs. Pugh's testimony would not have been especially incriminating in light of Mr. McCoy's admission that he was at the Mall of Memphis that evening. That testimony would, however, have ~~created some risk~~ to petitioner. During the guilt phase of the trial, the jury did not have petitioner's testimony that he and Mr. McCoy were together at the Mall of Memphis. The jury was, however, aware that petitioner drove Mr. McCoy back to the Penal

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[73] Mrs. Pugh also testified she believed the man she saw appeared to be about 35 years old. *See id.* at 362-63. At the time of the murder, Mr. McCoy was 24 years old. *See* P. Br., Exhibit 32, at 1.

Farm that evening. If trial counsel had attempted to persuade the jury that Mrs. Pugh had identified Mr. McCoy, then, the jury could assume that petitioner was also present at the Mall of Memphis, since he was Mr. McCoy's source of transportation.

Petitioner also complains that trial counsel did not follow up on information concerning Ms. Gilbert. As previously noted, however, *see supra* page 93, trial counsel did attempt to interview Ms. Gilbert but were frustrated in their efforts to do so. Petitioner also does not present any evidence that Ms. Gilbert knew that Mr. McCoy, not petitioner, committed the murder.

Trial counsel's alleged failure to present evidence suggesting that petitioner did not murder Mrs. Johnson. The Petition lists a variety of actions trial counsel allegedly could have taken to undercut the evidence at trial implicating petitioner. Whether these alleged deficiencies are considered separately or in the aggregate, petitioner cannot demonstrate prejudice.

The most substantial of petitioner's allegations is the claim that trial counsel did not call family members and friends to testify that petitioner and Mrs. Johnson had a happy and stable marriage. The testimony petitioner contends should have been offered is set forth in the discussion of Claim 12, *see infra* pages 187-90. The trial court judge made a factual finding after the first post-conviction hearing that petitioner's family members were not willing to testify on his behalf at trial. *See infra* pages 199-200. The Court must presume that that finding is correct unless petitioner presents clear and convincing evidence to the contrary. *See* 28 U.S.C. § 2254(e)(1).

Moreover, as previously noted, *see supra* pages 95-96, trial counsel labored mightily to persuade the trial court to exclude evidence they deemed unduly prejudicial, including evidence concerning petitioner's alleged extramarital relationships and numerous photographs of nude women that were found in petitioner's truck. *See* Addendum 1, Vol. 2, at 3 (objecting to "photographs of my client engaged in various acts of intercourse with other women"); *id.*, Vol. 3, at 197-99 (petitioner's relationship with Ms. McKee); *id.* at 283-91 (nude photographs). Although the trial court permitted extremely limited testimony with respect to petitioner's relationship with Ms. McKee, *see id.* at 202, it excluded the photographs. By presenting testimony that petitioner had a happy and stable marriage, trial counsel would open the door to impeachment. Thus, the Court cannot conclude that petitioner was prejudiced by trial counsel's failure to present evidence concerning the state of petitioner's marriage at the guilt phase of trial.

Petitioner complains that trial counsel failed to introduce the testimony of his nephew, Jeff Ward, that his blood was found on the bandana seized from petitioner's truck. There is some equivocal evidence in the record that trial counsel was aware of this evidence but failed to use it. *See* Addendum 13, Vol. 5, at 430-31 (testimony of W. Clark Washington, Esq.); *id.*, Vol. 5, at 317-24 (testimony of Jeff Ward). Petitioner was not prejudiced by this omission, however, because the State's expert failed to link the blood on the bandana to either petitioner or the victim. *See* Addendum 1, Vol. 5, at 421, 431 (testimony of Theresa Paulette Sutton).

Petitioner also complains that trial counsel did not impeach the testimony of his employer, James T. Force, who discovered the victim's body at the Mall of Memphis, that he saw the victim's breast when he looked in the window of the

van. Mr. Force's testimony is consistent with that of Memphis Police Officer Robert J. Stone, the first police officer to arrive on the scene, who testified as follows:

> Q. And I believe you'd indicated to us that the body was covered; is that correct?
>
> A. Yes, sir. It was-The body was mostly covered. There were some parts that were exposed.
>
> Q. What parts were exposed, please, sir?
>
> A. Part of her breast was exposed from the cover, it did not totally cover the body.

Addendum 1, Vol. 2, at 128; *see also id.* at 128-29. Even if that were not the case, petitioner does not even attempt to explain how he was prejudiced by trial counsel's omission.

Although petitioner challenges the failure of trial counsel to bring out the fact that Mall of Memphis security personnel noted that the windows to the victim's van were fogged up after 10:00 p.m. the night of the murder, petitioner also alleges in Claim 2 that the State withheld the identical evidence from trial counsel. *See* Petition at 30-31. Moreover, petitioner does not even attempt to explain why this testimony would have been useful to him.

Finally, petitioner complains of the failure of trial counsel to challenge the testimony that the trash bag found in the victim's mouth was unique and to offer an innocuous explanation for the presence of the victim's hair brush in petitioner's truck. Petitioner has not come forward with any evidence to support either of these assertions, nor has he

suggested that any such evidence was available to trial counsel at the time of trial.

The allegation that trial counsel advised petitioner to invoke his right not to testify at the guilt phase of his trial. As previously noted, petitioner did not testify during the guilt phase of his trial.[74] During the sentencing phase, petitioner testified that Mr. McCoy murdered the victim and that they transported the body to the Mall of Memphis. On cross-examination, petitioner could not explain why he had called family members and friends the day after the murder, pretending to be worried that his wife was missing. *See id.* at 519-20; *see also id.* at 521-22 (petitioner also telephoned Barry Pfister at Force Camping the night of the murder, claiming to be looking for his wife). In his opinion denying the post-conviction petition, the trial judge observed that, in his opinion, the cross-examination of petitioner was "devastating." *See* Addendum 13, Vol. 1, at 101. This Court is required to presume that the trial judge's credibility determination is correct. *See* 28 U.S.C. § 2254(e)(1). Accordingly, the Court finds that petitioner's testimony during the guilt phase would not have been helpful to him.

The allegation that trial counsel failed to challenge Ms. McKee's testimony. Petitioner complains that he received ineffective assistance of counsel because trial counsel (i) failed to challenge Ms. McKee's testimony that he wore a plaid shirt the night of the murder and (ii) did not bring out the fact that

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[74] The trial court judge questioned petitioner outside the presence of the jury to ensure that petitioner understood that he had a right to testify and that his waiver of that right was voluntary. *See* Addendum 1, Vol. 5, at 452-54. Petitioner has not presented any explanation to this Court why he should not be bound by his waiver.

Ms. McKee hoped to obtain a reward from Crime Stoppers. This claim is also without merit.

As previously noted, *see supra* page 68, there is no evidence in the record that Ms. McKee hoped to obtain a monetary reward from Crime Stoppers. Even if there were, trial counsel's failure to bring out that fact does not rise to the level of a Sixth Amendment violation.

Moreover, contrary to petitioner's allegations, trial counsel did attempt to impeach Ms. McKee's testimony that petitioner was wearing a plaid shirt the night of the murder. Ms. McKee testified at trial that she believed petitioner was wearing a plaid shirt when he visited her the night of the murder. *See* Addendum 1, Vol. 3, at 203-05, 208-09. On cross-examination, trial counsel tried to suggest that Ms. McKee had previously told the police that the petitioner was wearing the shirt of his work uniform. Ms. McKee pointed out that her statement actually said that, although petitioner usually wore a work uniform, she believed he wore a plaid shirt the night of the murder. *See id.* at 208-09.

Even if that were not the case, the Court finds that petitioner was not prejudiced. Ms. McKee was not the only witness to testify that petitioner wore a plaid shirt the night of the murder. *See* Addendum 1, Vol. 2, at 86-87 (testimony of Jo Ann Miller Force); *id.* at 102 (testimony of James T. Force).[75] In any event, although there was testimony at trial that there was blood on the cuff of the plaid shirt, *see id.*, Vol. 5, at 422-23 (testimony of Theresa Paulette Sutton), the State offered no evidence that the blood belonged to the

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[75] By contrast, Mr. McCoy testified that petitioner wore his uniform shirt that night. *See id.*, Vol. 3, at 372.

victim or petitioner, *see id.* at 431 (testimony of Theresa Paulette Sutton).

The allegation that trial counsel failed to take various other actions beneficial to petitioner. Petitioner further complains about a number of other actions he contends trial counsel should have taken. Virtually all of petitioner's allegations are duplicated elsewhere in the Petition and, therefore, will not be discussed at length here.[76] Whether considered singly or in the aggregate, there is no evidence that petitioner was prejudiced by any act or omission of trial counsel at the guilt stage of his trial.

Other allegations are sufficiently related to various claims that they will be addressed together. Accordingly, petitioner's claims that trial counsel should have had the trial court strike juror Chester Cranford for cause and should have sought a change of venue are addressed in connection with Claim 4. *See infra* page 135 n.101. In addition, petitioner's claims that trial counsel should have tried to rehabilitate jurors who

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[76] Many of petitioner's allegations are repeated elsewhere in the Petition, including petitioner's complaints that (i) trial counsel failed to challenge the prosecutor's statement vouching for Mr. McCoy's credibility in closing arguments, *see infra* pages 126-31 (Claim 3); (ii) trial counsel failed to strike juror Leona Payne, *see infra* pages 132-35 (Claim 4); (iii) trial counsel failed to move to suppress petitioner's two statements to the police, *see infra* pages 140-48 (Claim 6); (iv) trial counsel failed to move to suppress items that allegedly were unlawfully seized from petitioner's home and truck, *see infra* pages 148-53 (Claim 7); (v) trial counsel failed to object to testimony that petitioner did not consent to a search of his truck, *see infra* pages 157-60 (Claim 8(B)); and (vi) trial counsel failed to object to certain jury instructions, *see infra* pages 168-76 (Claim 11).

expressed reservations about the death penalty and should have moved for individual sequestered *voir dire* are addressed in connection with Claim 5. *See infra* page 140 n.106. Finally, petitioner's claim that trial counsel failed to order the transcript to aid in the drafting of its new trial motion is addressed in connection with Claim 18. *See infra* page 241 n.167.

For all the foregoing reasons, then, respondent's motion for summary judgment is granted as to this claim.

* * * *

L. Ineffective assistance of counsel during the sentencing phase of trial (Claim 12)

Claim 12 of the Petition alleges that petitioner received ineffective assistance of counsel during the sentencing phase of his trial. In particular, he complains that (i) trial counsel did not investigate mitigating circumstances; (ii) trial counsel failed to prepare petitioner for his sentencing hearing testimony; (iii) trial counsel did not have a mental health expert review petitioner's background; (iv) trial counsel failed to investigate the propriety of, and object to, the jury instructions respecting the "heinous, atrocious, or cruel" aggravating circumstance; (v) trial counsel failed to investigate whether Mrs. Johnson was dead or unconscious at the time a trash bag was put into her mouth even though such evidence would have defeated application of the "heinous, atrocious, or cruel" aggravating circumstance; (vi) trial counsel failed to investigate and challenge the constitutional validity of the prior convictions on which the State based the "prior violent felonies" aggravating circumstance; (vii) trial counsel failed to object to introduction of petitioner's arrest

record; and (viii) trial counsel failed to object to unconstitutional jury instructions.[132]

1. The legal standards

The general legal standards for evaluating claims of ineffective assistance of counsel asserted by habeas petitioners are set forth in the discussion of Claim 1. *See supra* pages 74-77. Those standards are equally applicable to claims that trial counsel were ineffective at the sentencing stage of a capital trial.

The Supreme Court has recently had occasion to consider a claim that trial counsel was ineffective for failing to investigate and present mitigating evidence. In *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000), the petitioner alleged that trial counsel failed to investigate and present several significant pieces of mitigating evidence.[133] The Supreme Court explained:

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[132] A number of these allegations are repeated in subsequent claims and, therefore, for the sake of clarity, will be addressed in connection with those claims. Accordingly, the discussion of Claim 12 encompasses grounds (i), (ii), and (iii). Ground (iv) is addressed infra pages 229-32 (Claim 16(A)), ground (v) is addressed infra pages 232-34 (Claim 16(B)), ground (vi) is addressed infra pages 235-38 (Claim 16(C)), ground (vii) is addressed infra pages 211-13 (Claim 13(C)), and ground (viii) is addressed *infra* pages 220-28 (Claim 15).

[133] In *Williams*, the petitioner had commenced a state habeas corpus proceeding. Based on the evidence adduced at a two-day hearing on petitioner's allegations, the trial court judge concluded that Williams' conviction was valid but his trial attorneys had been ineffective during sentencing. The trial court recommended that Williams be granted a new sentencing hearing. *See id.* at 370-71.

> We are likewise persuaded that the Virginia trial judge correctly applied both components of that [*Strickland*] standard to Williams' ineffectiveness claim. Although he concluded that counsel competently handled the guilt phase of the trial, he found that their representation during the sentencing phase fell short of professional standards--a judgment barely disputed by the State in its brief to this Court. The record establishes that counsel did not begin to prepare for that phase of the proceedings until a week before the trial. . . . They failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records. . . .

Id. at 395 (citation omitted); *see also id.* at 396 ("Of course, not all of the additional evidence was favorable to Williams. . . . But as the Federal District Court correctly observed, the failure to introduce the comparatively voluminous amount of evidence that did speak in Williams' favor was not justified by a tactical decision to focus on Williams' voluntary confession. Whether or not those omissions were sufficiently prejudicial to have affected the outcome of the sentencing, they clearly demonstrate that trial counsel did not fulfill their obligation to

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The Virginia Supreme Court did not accept that recommendation. Although it assumed that trial counsel were ineffective, it held that Williams did not suffer sufficient prejudice to be entitled to relief. *See id.* at 371-72. Likewise, the federal district court analyzed the record in detail and held that trial counsel were ineffective. *See id.* at 372-73. It appears that the district court did not conduct its own evidentiary hearing but, instead, was able to rely on the record developed in the state-court proceedings.

conduct a thorough investigation of the defendant's background.") (citing 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed. 1980)).[134]

The Supreme Court also discussed the standards for assessing prejudice:

> We are also persuaded, unlike the Virginia Supreme Court, that counsel's unprofessional service prejudiced Williams within the meaning of *Strickland*. After hearing the additional evidence developed in the postconviction proceedings, the very judge who presided at Williams' trial and who once determined that the death penalty was "just" and "appropriate," concluded that there existed "a reasonable probability that the result of the sentencing phase would have been different" if the jury had heard that evidence. . . . We do not agree with the Virginia Supreme Court that Judge Ingram's conclusion should be discounted because he apparently adopted "a per se approach to the prejudice element" that placed undue "emphasis on mere outcome determination." . . . Judge Ingram did stress the importance of mitigation evidence in making his "outcome determination," but it is clear that his predictive judgement rested on his assessment of the totality of the omitted evidence rather than on the notion that a single item of omitted evidence, no matter how trivial, would require a new hearing.

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[134] Consistent with its observation that application of the *Strickland* standard "'of necessity requires a case-by-case examination of the evidence,'" *id.* at 391 (citation omitted), the Supreme Court did not attempt to articulate general standards for determining when counsel is ineffective.

Id. at 396-97 (citations omitted). Moreover, the Supreme Court stressed that, in evaluating the prejudice component of *Strickland*, it is necessary "to evaluate the totality of the available mitigation evidence--both that adduced at trial, and the evidence adduced in the habeas proceeding--in reweighing it against the evidence in aggravation." *Id.* at 397-98 (citation omitted). Accordingly, the Supreme Court determined that Williams was entitled to relief.[135]

The Sixth Circuit has also recently considered several cases in which habeas petitioners have claimed ineffective assistance of counsel at the sentencing stage of their capital trials. In *Carter v. Bell*, 218 F.3d 581 (6th Cir. 2000), a pre-AEDPA decision, *see id.* at 591,

> the defense neither investigated nor introduced any evidence of mitigating factors, basing its argument on a theory of residual doubt by appealing to any lingering doubt the jury might have had regarding the conviction in an attempt to dissuade the jury from imposing the death penalty.

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[135] The Supreme Court also explained that its holding is not "new" but, rather, is based on law that was clearly established at the time of Williams' trial. *See id.* at 390 ("the merits of [Williams'] claim are squarely governed by our holding in *Strickland v. Washington*").

Id. at 587.[136] There had not been a state-court evidentiary hearing on trial counsel's performance during the sentencing phase of trial, *see id.* at 600, but the district court did conduct an evidentiary hearing at which extensive mitigating evidence was presented, *see id.* at 592-94.

The Sixth Circuit readily found the performance of counsel to be deficient. The Court explained:

> Trial counsel here did Carter a disservice by failing to investigate mitigating evidence. While counsel advanced several reasons for adopting their strategy, their reasons do not excuse their deficiency. The sole source of mitigating factors cannot properly be that information which defendant may volunteer; counsel must make some effort at independent investigation in order to make a reasoned, informed decision as to their utility. We find that reluctance on Carter's part to present a mental health defense or to testify should not preclude counsel's investigation of these potential factors. . . . We agree, therefore, with the district court's conclusions that defense counsel made no investigation into Carter's family, social or psychological background and that the failure to do so constituted representation at a level below an objective standard of reasonableness.

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[136] *See also id.* at 596 ("Counsel's theory [during the sentencing phase] was that even though the jury had convicted Carter at least in part on the basis of Price's testimony, there remained sufficient doubt about Price's credibility to prevent imposition of the death penalty. . . . Despite this theme, counsel did not request jury instructions on residual doubt about the credibility of Price or inequity in the Price and Carter sentences as potential non-statutory mitigating factors.").

Id. at 596-97; *see also id.* at 596 (counsel's explanations for their failures to investigate and present mitigating evidence).

With respect to the prejudice inquiry, the Sixth Circuit stated:

> Carter has presented substantial evidence of a childhood in which abuse, neglect and hunger were normal. In light of the quantity of mitigation evidence available, and the limits discussed above on what the State could introduce in rebuttal, we find ourselves unpersuaded that there is a reasonable probability that a jury would have returned the same sentence had the evidence been introduced.

Id. at 600; *see also id.* (trial counsel "presented no meaningful evidence by way of mitigation as a result of their failure to investigate and prepare, not as a result of trial strategy after thorough research. It is not just that the defense presented on Carter's behalf was ineffective; rather, Carter's attorneys did not even attempt to present a defense at the sentencing phase."). As a result, "we do not need to determine whether trial counsel's failure to investigate mitigating circumstances constituted deficiencies so severe as to dispense with the need to establish prejudice." *Id.*

In *Scott v. Mitchell*, 209 F.3d 854 (6th Cir.), *cert. denied*, 531 U.S. 1021, 121 S. Ct. 588, 148 L. Ed. 2d 503 (2000), by contrast, the Sixth Circuit declined to grant relief on a claim that trial counsel failed to investigate and present mitigating evidence and to interview certain members of Scott's family. The only evidence presented by the defense during the sentencing phase of trial consisted of Scott's unsworn statement in which he denied his guilt and refused to ask for mercy. *See* 209 F.3d at 880 & n.8. The state trial court made

factual findings in a post-conviction proceeding that the intransigence of Scott and his family members was to blame for the failure to present more extensive mitigating evidence and that, had Scott chosen to have a presentence report prepared or had family members testified, the jury would have learned of Scott's extensive criminal history. *See id.* at 880.

The Sixth Circuit held that Scott was not prejudiced by any deficiency on the part of counsel:

> The district court was correct to focus on the second *Strickland* prong. It is clear that, in its words, the "mitigating circumstances Scott wishes his counsel had presented . . . are largely, even overwhelmingly, negated by evidence that his background includes commission of robbery, assault, kidnaping, and other violent acts upon innocent citizens," and that prosecutors would have elicited such information from any family members who testified for Scott. The mitigating evidence would have revealed Scott's personal loyalty to his siblings, girlfriend, and children, and an exceedingly violent environment throughout his upbringing. As the district court said, it is impossible to say for certain that one juror would not have been swayed by this evidence, but certainty is not required here; we must ask only whether Scott has met his burden of demonstrating a reasonable probability that this would happen. None of the proffered mitigating evidence reduces Scott's culpability for the Prince murder or the string of violence that preceded it. Scott can only offer a hypothetical juror, not a reasonable probability, and hence cannot show prejudice.

Id. at 880-81.

Although the Sixth Circuit did not expressly reach the issue, it also stated that "it is not clear that the lawyers' performances fell below the objective standard" of the first *Strickland* prong. *See id.* at 881. The Sixth Circuit observed that it was bound by the state court's factual finding that Scott and members of his family were not cooperative. *See id.* Moreover, although "Scott's penalty-phase attorneys would certainly have been well-advised to conduct more research into mitigating factors than they did . . . , these lawyers had a credible reason for not presenting testimony: a desire to keep Scott's extensive criminal record from the jury." *Id.* (citation omitted).[137]

Likewise, in *Abdur'Rahman v. Bell*, 226 F.3d 696 (6th Cir. 2000), the Sixth Circuit reversed a district court's finding that a petitioner was prejudiced by counsel's conduct at the sentencing phase. The state post-conviction trial court had

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[137] The Sixth Circuit in Carter noted that, under Tennessee law, the State is not entitled to introduce a defendant's prior criminal record to rebut mitigating evidence concerning his background. *See* 218 F.3d at 600. Instead, the State is limited to the introduction of evidence that would rebut the specific mitigating evidence presented. *See id.* Moreover, because Scott was decided prior to the Supreme Court's decision in *Williams*,

> we find that *Williams* may limit Scott to the narrow facts of a federal court contemplating a habeas petition after a state court has conducted an evidentiary hearing and made a finding of fact that had mitigating evidence been introduced, the defendant's recent criminal history would have been presented to the jury in rebuttal.

Id. at n.2.

concluded that Abdur'Rahman's trial counsel were ineffective but he was not prejudiced

> because the evidence that he would have offered to support a finding of mitigating circumstances was both helpful and harmful and . . . it would not have been a prudent strategy to present the evidence.

Id. at 707.[138]

The Sixth Circuit explained:

> Petitioner did not suffer prejudice sufficient to create a reasonable probability that the sentencing jury would have concluded that the balance of aggravating and mitigating factors did not warrant death. We reach this conclusion even considering the evidence presented at the evidentiary hearing below. . . .
>
> Even considering the supplemental evidence heard by the district court and outlined in its opinion, Petitioner did not suffer prejudice at the sentencing phase due to his trial counsel's deficient performance. While it is true that much of the supplemental evidence contains mitigating evidence that a sentencer might find to be compelling, the same evidence likewise has aspects that would be compelling evidence of aggravating circumstances. In particular, the supplemental evidence contained a description of Petitioner's motive

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[138] In *Abdur'Rahman*, the state post-conviction trial court had made extensive factual findings concerning the allegedly deficient performance of trial counsel. *See id.* at 701-02. The district court also ordered its own evidentiary hearing.

> for killing a fellow prison inmate and a history of violent character traits. . . .

Id. at 708-09; *see also id.* at 708 (quoting the conclusion of the Tennessee Court of Criminal Appeals that "'it probably would not have been the most prudent trial strategy to use proof of appellant's history of violent behavior and anti-social personality disorders at either the guilt or innocence phase or at the sentencing phase of the trial'").

2. The factual record

The defense presented very little proof during the sentencing phase of petitioner's trial. Trial counsel's opening statement consisted in its entirety of the following:

> The Defense in this stage will allow you to see Donnie Johnson on the stand. He will tell you for the first time his version of the events of the evening of December 8th. You've been a most attentive jury throughout this trial and I want you to listen to what Mr. Johnson has to say about those events. Listen very carefully. Listening, observing, see whether or not you believe the version that he gives you, and I feel comfortable that if you do you'll consider this to be a mitigating factor wherein you can justify the life sentence rather than the death sentence.

Addendum 1, Vol. 5, at 487.

The defense called only two witnesses at the sentencing phase of the trial. As previously mentioned, petitioner testified that Mr. McCoy killed Mrs. Johnson and the two of them then transported her body to the Mall of Memphis. *See id.* at 506-13. Petitioner also testified that, although he

sometimes tries to sound tough, he is not a violent person and could not have killed his wife. *See id.* at 514-15. Trial counsel concluded petitioner's direct examination by eliciting the simple statement that petitioner wants to live. *See id.* at 516.

Trial counsel also presented the testimony of Robert G. Lee, a Southern Baptist minister, who stated that he had met with petitioner and his family regularly in the months following petitioner's arrest. With respect to the content of their discussions, Mr. Lee stated:

> Well, naturally, being-my being an ordained minister our discussions centered around the topic of religion. Donnie expressed to me on numerous occasions that his faith in God was what was sustaining him through this ordeal. He also expressed to me that he knew that ultimately one day he would have to give an accounting of his life to God.

Id. at 531. Mr. Lee's testimony in its entirety encompasses less than three pages of the trial transcript.[139]

In his summation, trial counsel emphasized the heavy responsibility on the jury, *see* Addendum 2, at 83, 86, and urged the jury to consider whether "justice [is] going to be

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[139] During the guilt phase of petitioner's trial, certain additional mitigating evidence was elicited. Thus, there was evidence in the record that petitioner held a responsible position at Force Camping, where he was a valued employee, *see id.*, Vol. 2, at 51, 71-72, 75-76 (testimony of Jo Ann Miller Force); *id.* at 89, 106-07 (testimony of James T. Force). There was also evidence that petitioner adopted his wife's daughter by a previous marriage. *See id.*, Vol. 4, at 321-22 (testimony of Mary Frances Dean).

served by taking another life," *id.* at 84, 86. Trial counsel emphasized that, regardless of the decision of the jury, petitioner would have to live with what happened for the rest of his life, *see id.* at 86-87, and that petitioner would suffer if he received a sentence of life imprisonment, *see id.* at 87.

The factual record concerning trial counsel's alleged failure to investigate and present mitigating evidence is not well developed. At the hearing on the first post-conviction petition, petitioner testified that, prior to trial, he provided trial counsel with the names of a number of witnesses who could testify on his behalf, including family members, his friend Barry Gray, and others who could rebut evidence that petitioner's marriage was rocky. *See* Addendum 13, Vol. 2, at 106-08; *see also id.* at 108-09, 123. Petitioner also testified that trial counsel did not prepare him for his testimony at the sentencing phase and did not advise him that the jury could use his testimony against him. *See id.* at 141.

A number of petitioner's family members also testified at the post-conviction hearing. Ruby Johnson, petitioner's mother, testified that trial counsel did not ask her about petitioner's background. *See* Addendum 13, Vol. 4, at 367. She testified that petitioner "and his wife and family lived next door to me all these years, ever since [they have] been married," id., that she did not know of any problems in petitioner's marriage, and that he was a hard worker who cared for his family and raised well-mannered children, *see id.* at 367-68.

James Johnson, petitioner's father, testified ~~that~~ petitioner "was one of the most devoted person[s] to his family that I have ever seen," *id.* at 370, and that he was a good son, a hard worker, and a good family man, *see id.* at 370-71. Mr. Johnson also testified that trial counsel asked him "very little"

about petitioner's background and schooling. *See id.* at 370. Petitioner's father also testified that he offered to testify at trial but trial counsel stated it would be better not to offer any testimony by family members. *See id.* at 370, 372.

Petitioner's brother, James C. Johnson, Jr., testified that trial counsel did not ask about petitioner's background, "nothing other than his arrest in Ohio, things of that nature." *Id.* at 373. He testified that he spent a significant amount of time with petitioner and his family "and I never had any problems out of his or knew of anything." *Id.* at 374. With respect to petitioner's relationship with the victim, Mr. Johnson testified that "there was never an altercation of any kind that I remember other than fun and laughter." *Id.* Mr. Johnson also stated that he was available to testify on behalf of his brother, but trial counsel "said it would be advisable not to." *Id.*; *see also id.* at 375.

Petitioner's sister, Shirley Ward, testified that she was never contacted by trial counsel. *See id.* at 378. She stated that petitioner was a good family man who did not have any problems at home. *See id.* at 378-79. With respect to petitioner's relationship with his wife, Ms. Ward stated:

> The weekend before she [was] killed, we were up there on a Saturday afternoon visiting with them, and Connie said that she and Donnie were happier than they [had] ever been. He was building a new addition, a bedroom, on for them.

Id. at 379. On cross-examination, Ms. Ward admitted that she knew nothing about petitioner's alleged or admitted extramarital relationships. *See id.* at 379-80.

Mary Ward, petitioner's sister, testified that she told trial counsel she was available to testify at trial. *See id.* at 381-82. Post-conviction counsel did not ask Ms. Ward what she would have testified to. On cross-examination, she stated that "all I know is that Donnie loved Connie, and he would not have killed her. And they had a happy marriage." *Id.* at 384. She did not admit to knowing anything about the alleged problems in petitioner's marriage. *See id.* at 382-84.

Barry Gray, who had been a friend of petitioner since their childhoods, *see id.* at 384-85, testified that petitioner was a good friend and a hard worker who seemed to care for and provide for his family, *see id.* at 385; *see also id.* at 387 ("Donnie is a very loyal friend" and a good family man as far as he knew). He also stated that he could testify to "a long-time friendship and all the things that we shared and, you know, done for each other." *Id.* at 386. Mr. Gray stated that he would have been willing to testify at trial. *See id.*

Petitioner also presented the testimony of Officer James M. Ingram, a deputy jailer with the Shelby County Sheriff's Department, who testified that, when petitioner was incarcerated after his arrest for the murder of his wife, "he didn't cause any trouble. He never had a disciplinary write-up or anything to my knowledge." *Id.* at 334. Officer Ingram stated he would have been willing to testify at petitioner's trial but did not receive a subpoena. *See id.*

David Force, an owner of Force Camping, testified that petitioner was a good employee. *See id.* at 340.

Mr. Crow, petitioner's lead trial counsel, testified that he had been practicing law since 1974 and, at the time of petitioner's trial, about half his practice was criminal. *See id.*, Vol. 3, at 178, 215. Prior to petitioner's trial, Mr. Crow had

had five or six criminal trials and, at most, one capital trial. *See id.* at 214, 215, 250-51, 253. Mr. Crow had also conducted civil trials, and he testified that petitioner's trial was the only criminal trial he had ever lost. *See id.* at 254. He did not recall attending any seminars on the death penalty, *see id.* at 215-16, and he reviewed the statute enumerating mitigating factors in the courtroom, *see id.* at 230.

Mr. Crow said he did not have a mental evaluation of petitioner performed because petitioner seemed to be competent. *See id.* at 212. With respect to his handling of the mitigation issue, Mr. Crow testified:

> As I remember, we talked to the family. We talked to the minister. We talked to Johnson. And we decided after doing all that to handle the sentencing hearing in the manner in which it was done.

Id. He stated that he talked to petitioner concerning the evidence that would be presented at the sentencing hearing and that petitioner made the decision to testify. *See id.* Mr. Crow also testified that petitioner's family members did not want to testify. *See id.* at 205-06.

Mr. Washington, petitioner's co-counsel at trial, testified that his background was primarily in civil practice. *See id.*, Vol. 5, at 431-32. Mr. Washington corroborated Mr. Crow's testimony that petitioner's family members were reluctant to testify at trial. *See id.* at 427-28.

Petitioner also presented expert testimony concerning the manner in which background investigation should be performed in capital cases in Tennessee. Jeff Blum, administrator of the Capital Case Resource Center, testified

about the necessity for speaking extensively with the petitioner and members of his

> family, friends, employers, school teachers, medical personnel [who] may have had some contact with the individual, social workers [who] may have had some contact with the family through some way, church officials who may have dealt with the family, military background.
>
> We do a fairly extensive search of all the various points of contact an individual would have had sometime in their past life. And through that process, gathering as much written material, papers, files, records that we can in that process toward discovering information we feel may be helpful in mitigation, and at the same time, gathering names of other individuals who may be helpful in testifying on behalf of the defendant.

Id., Vol. 2, at 57-58; *see also id.* at 63, 65-67; *see also id.*, Vol. 4, at 272-74, 276-77 (testimony of Edward Thompson, Esq.); *id.* at 286-88 (testimony of D'Armey Bailey, Esq.); *id.* at 388-400 (testimony of Christine Glenn, a mitigation specialist with the Shelby County Public Defender's Office).[140]

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[140] As previously mentioned, *see supra* page 16, petitioner's successive post-conviction petition contained a number of factual affidavits. Mr. Gray stated:

> I was under subpoena to testify at Donnie's post-conviction hearing but, was never contacted by anyone as to what my testimony would be thus leaving me totally in the dark as to how far I could go with the few questions that was put to

3. Procedural default

> me while on the stand.
>
> I did have further testimony and had someone interviewed me before the hearing I would have made this known. I did the best I could but felt there was much that was left out and I was not questioned on all that I had knowledge of and wanted to testify to.

Affidavit of Barry Gray, sworn to May 19, 1989, in Addendum 41, at 34. Mr. Gray stated he had personal knowledge of petitioner's relationship with the victim. *See id.* Petitioner's sisters, Mary Ward and Shirley Ward, submitted similar affidavits. *See id.* at 52, 53.

In addition, Denise Johnson, a family friend, submitted an affidavit in which she stated that she was subpoenaed to testify at the post-conviction hearing but was not called by post-conviction counsel. *See* Affidavit of Denise Johnson, sworn to June 14, 1989, in Addendum 41, at 54. Ms. Johnson stated that "had I been allowed to testify I would have offered testimony that would have rebutted the states theory of a rocky marriage, as well as to my personal knowledge of the good father and husband Donnie was." *Id.*

Finally, William Wicks, a captain with the Shelby County Deputy Sheriffs Department, submitted an affidavit in which he stated that he knew petitioner while he was incarcerated in 1985 and that "in all the time I knew this inmate I never had any problems with him nor did he have any problems during his time in the county jail." Affidavit of William Wicks, sworn to May 30, 1989, in Addendum 41, at 35. Captain Wicks stated that he was available to testify at the post-conviction hearing but was not subpoenaed and did not know about the hearing until it was over. *See id.*

As respondent concedes, *see* Answer at 44-45, petitioner has exhausted a general allegation of ineffective assistance of counsel during the penalty phase of his trial. *See* Answer at 44-45. In the Amended Petition for Post-Conviction Relief, petitioner alleged that trial counsel were ineffective for the following reasons:

> B. Trial counsel failed to investigate and present any social or psychological evidence. That Trial Counsel never had a routine examination to determine the competency of the defendant. That the Petitioner's social background was not investigated or presented for purposes of mitigation at sentencing.
>
> C. That Counsel did not adequately investigate or present any character witnesses at the sentencing even though the Petitioner had available a variety of potentially helpful witnesses.
>
> D. That Counsel presented little evidence at sentencing that would be mitigating in the Petitioner's behalf.

Addendum 13, Vol. 1, following page 119 (PP4(c)-4(e)).

On appeal, petitioner argued that trial counsel were ineffective in that they failed to investigate and present evidence during the penalty phase of the trial. *See* Addendum 19, at 47-51. The Tennessee Court of Criminal Appeals rejected that position. *See* Addendum 22, at 2-3. This issue was also raised in petitioner's application for permission to appeal to the Tennessee Supreme Court. *See* Addendum 31, at 48-52.

Petitioner's allegations of ineffective assistance of counsel at the penalty phase of his trial are far more developed than the claims that were presented to the state court. Petitioner's allegations of ineffective assistance of counsel at the penalty stage of his trial consist of a laundry list of allegations, spanning four pages of the Petition, that include a mixture of legal claims and factual allegations. Just as with petitioner's allegations of ineffective assistance of counsel at the guilt stage of trial, it is first necessary to determine which claims were exhausted in state court. The Court will then consider whether it is entitled to consider the merits of those claims that were not properly raised in any state-court proceeding.

Claims that were exhausted in state court. The following claims were exhausted in state court and are, therefore, properly before this Court:

(a) Trial counsel failed to investigate petitioner's background for mitigating circumstances. Trial counsel did not contact petitioner's family members or friends respecting potential mitigating circumstances, nor did they obtain records respecting petitioner's childhood. *See* Petition at 37.

(b) Petitioner maintained family and friends who cared for him and considered him a good man who worked hard and provided for his family. *See* Petition at 38.

(c) Trial counsel failed to prepare petitioner for his sentencing hearing testimony. As a result, Mr. Johnson's testimony at the sentencing hearing did not present mitigating circumstances. *See* Petition at 38-39.

(d) Trial counsel did not have a mental health expert review petitioner's background. *See* Petition at 39.

Claims that were not raised in state court. The Petition contains a large number of factual assertions that are not supported by any evidence in the record:

(a) Mr. Johnson was born with congenital myopia and, due to this condition, he was unable to see his surroundings until receiving glasses when he was two years old. *See* Petition at 37.

(b) Because he could not see his surroundings, as a child Mr. Johnson regularly fell down a flight of concrete stairs leading to his home's basement. *See* Petition at 37.

(c) Mr. Johnson's parents regularly beat him with their fists, their feet, belts, tree limbs, and other objects.

(d) When Mr. Johnson was in the second or third grade, he was hit in the forehead with a baseball bat. *See* Petition at 37.

(e) From the time he was six years old until he was eight, Mr. Johnson was sexually assaulted by an uncle, a truck driver, when he visited the Johnson family. *See* Petition at 38.

(f) To escape the misery of his home, Mr. Johnson ran away. After doing so a number of times, Mr. Johnson's parents placed him in the Jordania Youth Center. *See* Petition at 38.

(g) At Jordania, Mr. Johnson was sexually assaulted by an inmate, beaten by inmates, and beaten by guards. *See* Petition at 38.

(h) After being released from Jordania, Mr. Johnson was sent to Pikeville Reform School. *See* Petition at 38.

(i) At Pikeville, Mr. Johnson was sexually assaulted by an inmate, beaten by inmates, and beaten by guards. *See* Petition at 38.

(j) After being released from Pikeville, Mr. Johnson was held in the Tipton County Jail for vandalism. Trustees stoned Mr. Johnson with glass bottles. *See* Petition at 38.

Petitioner also did not raise in state court his claim that, as a result of trial counsel's failure to prepare him for his testimony, petitioner's testimony at the sentencing hearing was limited to petitioner's denial that he killed Mrs. Johnson. Because the jury had just stated it believed he killed Mrs. Johnson, petitioner's sentencing hearing testimony was virtually worthless if not hurtful. *See* Petition at 38.[141]

Because petitioner did not raise any of these allegations in state court, these claims are procedurally barred. Petitioner has not even presented an argument that this Court should not reach this result, nor has he presented any evidence to this Court that would support these claims. Moreover, as previously noted, see supra pages 58-59, the law is clear that the ineffectiveness of post-conviction counsel would not be sufficient to excuse this default.

The Court also holds that, because petitioner has "failed" to develop this issue in state court, he has not satisfied the conditions that would permit this Court to hold an evidentiary hearing. *See* 28 U.S.C. § 2254(e)(2); *see also supra* pages 64-

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[141] Indeed, petitioner's testimony at the hearing on the post-conviction petition did not present evidence of mitigating circumstances but, instead, was limited to an explanation of the claims raised in his petition.

66. Petitioner cannot demonstrate that he could not have developed the facts in support of his claim in state court. Numerous family members testified at the post-conviction proceeding. If relevant information was not developed, it can only be because post-conviction counsel did not ask the appropriate questions. Because the AEDPA is applicable to petitioner's claims, the Court does not have inherent discretion to hold an evidentiary hearing. *See supra* page 66 n.44.

Although petitioner has not raised this issue, the Court also is unable to consider this evidence-assuming it even exists-on a theory that petitioner is legally innocent of the death penalty. As previously noted, *see supra* page 34, the discovery of new mitigating evidence does not constitute grounds for a claim that a petitioner is legally innocent of the death penalty. *See Sawyer v. Whitley*, 505 U.S. at 345. In any event, the factual information set forth in the Petition is not "new"; instead, it is nothing more than information that was readily available to post-conviction counsel but which was not, for whatever reason, used.[142]

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[142] The Court admits to being deeply troubled by its inability to consider what appears to be valid mitigating evidence-assuming, of course, that such evidence exists. Christine Glenn, the mitigation specialist for the Shelby County Public Defender's Office, testified that she did a background investigation of petitioner in preparation for the hearing on the post-conviction petition. *See* Addendum 13, Vol. 4, at 393-95. Post-conviction counsel did not ask Ms. Glenn to testify to the information she developed as a result of that investigation. The record also does not reveal whether any lawyer representing petitioner subpoenaed any records concerning petitioner, including medical records, school records, military records, social service records, and records maintained by the various institutions in which petitioner has been confined.

4. The state-court decisions

The Tennessee state courts rejected petitioner's claim that he received ineffective assistance of counsel during the penalty phase of his trial. In his order denying relief on the petition, the trial court judge made the following factual findings:

> (1) As to ground (b) the petitioner alleges that trial counsel failed to investigate and present any social or psychological evidence and failed to inquire into his competency. As to this allegation the petitioner called two attorneys, six members of his family, Jeff Blum of the Capital Resources Center and one jailer. Mr. Crow testified as to his contact with members of the petitioner's family. This is supported by Ex. # 2. According to Mr. Crow his family could not or would not get involved in testifying. Mr. Crow did offer the petitioner during the penalty stage. At that time the jury heard the petitioner's version of the facts as to

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Because of the complete absence of factual evidence, the Court declines to speculate on whether petitioner was sufficiently prejudiced by the failure to develop this evidence in state court as to undermine confidence in the outcome of the penalty phase.

The Court emphasizes that no conclusion has been reached with respect to whether post-conviction counsel was at fault for failing to present the factual evidence set forth in the Petition. Post-conviction counsel have not been asked to explain the choices made by them and, because the negligence of post-conviction counsel would not excuse a procedural default, no useful purpose would be served by such an inquiry. The Court's observations here are not intended as a reflection on the professional conduct of any attorney but, instead, reflect dismay at the scant attention that has been devoted to what appears to be one of the few potentially meritorious issues in this Petition.

how and the manner of his wife's death occurred. The petitioner contended that McCoy killed his wife. The cross-examination in this stage, in the Court's opinion, was devastating. The Jury evidently rejected the petitioner's testimony. Members of his family would testify that he was a good worker and had a good marriage. During the guilt phase his employer testified as to his work habits and his concern for his wife missing. The State's evidence would show that their marital relationship was strained. The jury had these mitigating circumstances, if they are, for consideration. There is no merit to this allegation.

(2) As to ground (c)-the trial counsel failed to produce character witnesses, the trial attorney did not call any character witnesses in mitigation. Mr. Bruce [sic] Gray would testify that the petitioner was a good family man. The Court finds that the failure to call this witness would not substantially alter the decision of the jury.

(3) As to ground (d), both trial attorneys stated that family members were very supportive in wanting to help the petitioner. Especially in the investigative stage. However, they were reluctant to take the witness chair. Then trial counsel offered petitioner as to the best source for mitigation. As the Court previously noted the jury rejected the petitioner's testimony. This Court charged the jury all the relevant statutory mitigating circumstances as well as any relevant circumstances they could arrive at in all the testimony.

Addendum 13, Vol. 1, at 101.

The trial court also reached the following legal conclusions:

> As to the penalty stage, the decision to call witnesses rests with the trial attorneys. . . .
>
> The proof shows that Mr. Crow and Mr. Washington, after full consultation with the petitioner, made certain strategic and tactical decisions at the penalty stage in not calling family members as witnesses. The attorneys must do this after weighing all the factors favorable and unfavorable to their client. They are not to be second guessed as to their decision. . . .
>
> The Court is of the opinion that counsel are required to exert every reasonable effort on behalf of a client both in the investigation and in the trial of a case. The Court finds nothing in the evidentiary hearing to suggest that there was any failure of counsel to meet the standards of competence required in criminal cases or that any action or inaction on their part prejudiced the case of their client.
>
> There is no legal requirement and no established practice that the accused must offer evidence at a sentencing hearing. . . .
>
> Both attorneys fully complied with the mandates of . . . *Strickland v. Washington* . . . .

Id. at 103-04 (emphasis in original; citations omitted).

The Tennessee Court of Criminal Appeals affirmed. With respect to this issue, they stated as follows:

> We do feel compelled, however, to remark briefly upon . . . that portion of issue number three which asserts a failure of counsel to put on mitigating evidence at the penalty phase.
>
> The attorney testified members of [Mr. Johnson's] family would not testify at the sentencing phase of the trial. This, he says, left him without any witnesses to offer testimony in mitigation of the acts of [Mr. Johnson].
>
> At the post-conviction hearing, members of [Mr. Johnson's] family testified they wished to testify at the convicting trial but were not called to do so.
>
> These witnesses testified they would have told the jury [Mr. Johnson] was a hard worker who loved his family. The major flaw in this was the fact [Mr. Johnson] was convicted of murdering his wife.
>
> We conclude this evidence would not have benefitted [Mr. Johnson], and the failure of the trial lawyer to call these witnesses during the penalty phase of the trial gives no right to a new trial. . . .

Addendum 22, at 2-3 (citation omitted).

5. The merits of petitioner's claim

In evaluating the merits of petitioner's claim, the Court is required to accept the state courts' factual findings in the absence of clear and convincing evidence to the contrary. *See* 28 U.S.C. § 2254(e)(1); *see also Strickland v. Washington*, 466 U.S. at 698; *cf. Abdur'Rahman v. Bell*, 226 F.3d at 702-

04 (discussing the presumption of correctness under pre-AEDPA law).

To the extent that the state courts held that the performance of trial counsel was not deficient,[143] such a holding represents an unreasonable application of clearly established federal law. As previously noted, *see supra* page 180 n.135, the Supreme Court recently held in *Williams v. Taylor*, 529 U.S. at 390, that the law has been clear since the 1984 decision in *Strickland* that counsel has a duty to investigate and present mitigating evidence. The evidence suggests that petitioner's trial counsel were ineffective for failing to investigate mitigating evidence. *See Carter v. Bell*, 218 F.3d at 600. There is no evidence trial counsel sought to obtain any medical, school, or social service records concerning petitioner. Although trial counsel spoke to several members of petitioner's family,[144] the record suggests that trial counsel did not fully explore potential mitigating evidence. Trial counsel apparently did not speak to family friends or jailers. Trial counsel also did not order a psychological evaluation of petitioner.

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[143] Although the trial court clearly made such a determination, it is not clear whether the Tennessee Court of Criminal Appeals reached that issue or if it based its decision solely on a finding that petitioner was not prejudiced.

[144] Post-conviction counsel attempted to establish that any contacts trial counsel had with members of petitioner's family were minimal or involved matters other than preparing for petitioner's defense at trial. Trial counsel denied that that was the case. The trial court judge accepted the testimony of trial counsel, which he found to be corroborated by the attorneys' time records. *See supra* page 199. The Court is required to accord special deference to the credibility determinations of the trial court judge.

Although the performance of trial counsel may well have been deficient in some respects,[145] petitioner is entitled to

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[145] The Court does not reach the issue whether trial counsel were deficient for failing to present mitigating evidence. It cannot be concluded from the evidence in the record, however, that trial counsel made the conscious decision to pursue a residual guilt strategy. Trial counsel did not explicitly argue during the sentencing phase that Mr. McCoy committed the murder, and they did not suggest that it was in any way unjust for petitioner to face the death penalty while Mr. McCoy suffered no penalty for his participation in Mrs. Johnson's murder. Trial counsel also did not request a residual doubt instruction. Nonetheless, because post-conviction counsel failed to develop the factual record concerning trial counsel's strategic choices at the sentencing phase hearing, the Court is not in a position to reach a definitive conclusion with respect to this issue.

The evidence does suggest that trial counsel did not sufficiently prepare petitioner for his testimony during the sentencing hearing. The Court has previously rejected petitioner's argument that counsel were ineffective during the guilt stage of trial for failing to present at that time petitioner's testimony that he did not kill his wife. *See supra* page 106. Mr. Crow testified at the post-conviction hearing that he advised petitioner not to testify during the guilt phase because he found his testimony to be unbelievable and thought petitioner would not make a good witness. *See* Addendum 13, Vol. 3, at 210. Given this professional judgment, which, from the evidence in the record, appears to be eminently reasonable, the Court cannot understand why trial counsel did not strongly urge petitioner not to testify during the sentencing phase or, alternatively, to limit his testimony to matters that would tend to establish mitigating circumstances. The introduction of petitioner's testimony may well have hindered trial counsel's ability to use a residual doubt strategy. As a result of petitioner's testimony, the jury was essentially asked to decide whether they believed that petitioner, acting alone, killed his wife or whether Mr. McCoy, acting alone, killed Mrs. Johnson. The jury had no basis--other than

relief on this claim only if he suffered sufficient prejudice to undermine confidence in the outcome of the sentencing phase of his trial. In that regard, the Court is bound by the trial court's finding that petitioner's family members were unwilling to testify on his behalf. *See Scott v. Mitchell*, 209 F.3d at 881. Instead, any testimony would have had to come from petitioner himself or from friends.

Moreover, because of previous rulings on the issue of procedural default, *see supra* pages 194-97, the Court is entitled to consider only evidence that petitioner maintained family and friends who cared for him and considered him a good man who worked hard and provided for his family. As previously noted, *see supra* page 186 n.139, there was some evidence in the trial-court record that would support these contentions. Moreover, both the trial court judge and the Tennessee Court of Criminal Appeals found that this testimony would not have been helpful to petitioner. *See supra* pages 199-201. This Court must accept that finding unless it is unreasonable. *See* 28 U.S.C. § 2254(d)(2). Given the extremely limited scope of the mitigating testimony that was offered during the post-conviction hearing, the Court is not in a position to reach such a conclusion. Finally, as was previously observed in connection with petitioner's claim of ineffective assistance of counsel during the guilt stage, *see*

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speculation--to consider a third possibility: that petitioner and Mr. McCoy killed the victim together. Trial counsel was not asked to explain this decision during the post-conviction hearing. Moreover, as previously noted, *see supra* pages 196-97, petitioner did not exhaust in state court any claim that his testimony was affirmatively detrimental to him. Accordingly, in considering petitioner's claim of failure to prepare him for testifying, the Court is limited to consideration of the failure to elicit mitigating evidence from petitioner.

supra pages 103-04, introduction of testimony concerning the state of petitioner's marriage would open the door to rebuttal evidence that may well have been significantly prejudicial to petitioner. For these reasons, petitioner is not entitled to relief.

This leaves petitioner's claim that trial counsel should have ordered a psychological evaluation. The record does not reflect whether such an evaluation was performed, although Tennessee law at the time of the first post-conviction hearing apparently did not authorize post-conviction counsel to seek such an evaluation. *See Owens v. State*, 908 S.W.2d 923 (1995). Given the previous holdings on the issue of procedural default, *see supra* pages 195-96, however, the Court cannot conclude that there is any reasonable likelihood that a psychological evaluation would benefit petitioner. There is no evidence in the record concerning the primary facts of petitioner's background, and petitioner has not exhausted in state court his claim that trial counsel should have discovered and presented any such information. Under those circumstances, there is very little admissible evidence that could be developed through a psychological evaluation. The Court cannot, of course, permit petitioner to substantiate through the back door of a psychologist's testimony claims that have plainly been procedurally defaulted. Accordingly, the Court declines to order a psychological evaluation of petitioner at this late date.

For all the foregoing reasons, the Court grants summary judgment to respondent on this claim.

* * * *

R. Ineffective assistance of counsel on direct appeal (Claim 18)

In Claim 18, petitioner argues that he received ineffective assistance of counsel on direct appeal in violation of the Eighth and Fourteenth Amendments.[166] In particular, petitioner complains that counsel failed to raise or argue effectively issues discussed in Claims 3-11, 13-17, and 20.

The Court agrees with respondent that this Claim has been exhausted, but only with respect to those issues that were presented to the Tennessee Supreme Court on appeal in the first post-conviction proceeding. *See* Answer at 62-63. An examination of petitioner's brief to the Tennessee Supreme Court, *see* Addendum 30, indicates that respondent is correct that (i) petitioner only complained about the performance of Messrs. Crow and Washington, not substitute counsel, *see id.* at 6; and (ii) the only issues petitioner claimed should have been raised or argued effectively were the eleven issues contained in the brief submitted by substitute counsel on direct appeal, *see id.* at 5, 8. Accordingly, the Court holds that petitioner has procedurally defaulted with respect to each issue that was not raised before the Tennessee Supreme Court on direct appeal or on appeal from dismissal of the first post-conviction petition.

The standards for evaluating a claim by a habeas petitioner of ineffective assistance of counsel are set forth in connection with Claim 1, *see supra* pages 74-77, and will not

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[166] The Petition does not mention the Sixth Amendment with respect to this Claim. The Court will consider the Sixth Amendment issue because it is plain from the face of the Petition and the state-court record.

be repeated here. With respect to those issues that were properly exhausted, the Court holds that petitioner cannot establish prejudice. As previously noted, the opinion of the Tennessee Supreme Court on appeal in the first post-conviction proceeding makes clear that it did consider on the merits each of the eleven issues raised in the brief submitted by substitute counsel. *See* Addendum 39, at 5; *see supra* page 15. Because petitioner was not prejudiced, the Court need not decide whether counsel's performance was deficient.[167]

For all the foregoing reasons, the Court grants summary judgment to respondent on this claim.

* * * *

E. APPEAL ISSUES

I. Certificate of Appealability

The Court must also determine whether to issue a certificate of appealability. The statute provides:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained

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[167] Petitioner also argues that his trial counsel were ineffective for failing to order a transcript to assist in the drafting of their motion for a new trial. *See supra* page 109 n.76. Because of the decision of the Tennessee Supreme Court on direct review, the Court finds that petitioner was not prejudiced by this omission.

> of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253(c).

Lyons v. Ohio Adult Parole Authority, 105 F.3d 1063, 1073 (6th Cir.), *cert. denied*, 520 U.S. 1224, 117 S. Ct. 1724, 137 L. Ed. 2d 845 (1997), held that district judges may issue certificates of appealability under the AEDPA, Pub. L. 104-132, Title I, § 102, 110 Stat. 1220 (Apr. 24, 1996). The Sixth Circuit also held that the AEDPA codifies in amended section 2253 the standard for issuing a certificate of probable cause found in prior section 2253, which was essentially a codification of *Barefoot v. Estelle*, 463 U.S. 880, 893, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983). *See Lyons*, 105 F.3d at 1073; *see also Slack v. McDaniel*, 529 U.S. 473, 483-84, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000).

> Probable cause requires something more than the absence of frivolity . . . and the standard for issuance of a certificate of probable cause is a higher one than the "good faith" requirement of § 1915. . . . [A] certificate of probable cause requires petitioner to

> make a substantial showing of the denial of [a] federal right. [A] question of some substance, or a substantial showing of the denial of [a] federal right, obviously [does not require] the petitioner [to] show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further.

Barefoot, 463 U.S. at 893 (internal quotations and citations omitted).

Under appropriate circumstances, a petitioner may be entitled to a certificate of appealability where a district court rejected a claim on procedural grounds:

> When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a CCA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. This construction gives meaning to Congress' requirement that a prisoner demonstrate substantial underlying constitutional claims and is in conformity with the meaning of the "substantial showing" standard provided in Barefoot . . . and adopted by Congress in AEDPA. Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in

> dismissing the petition or that the petitioner should be allowed to proceed further. In such a circumstance, no appeal would be warranted.

Slack, 529 U.S. at 484. Thus,

> determining whether a COA should issue where the petition was dismissed on procedural grounds has two components, one directed at the underlying constitutional claims and one directed at the district court's procedural holding. Section 2253 mandates that both showings be made before the court of appeals may entertain the appeal.

Id. at 484-85.

In this case, for the reasons discussed above, the Court will issue a certificate of appealability with respect to petitioner's Claim 12(A)-(C), that he received ineffective assistance of counsel at the sentencing phase of his trial due to the failure to investigate and present mitigating evidence. In that regard, the certificate of appealability is expressly limited to those portions of that claim which the Court has held are not subject to a procedural default.

The remainder of petitioner's claims are clearly devoid of substantive merit, and he cannot present a question of some substance about which reasonable jurists could differ. The Court therefore denies a certificate of appealability for those claims.[170]

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[170] The Court does, however, find it necessary to explain the decision to deny a certificate of appealability with respect to petitioner's Claim 16(A), that the heinous, atrocious, or cruel

II. *In Forma Pauperis* Appeal

Also regarding any appeal, the United States Court of Appeals for the Sixth Circuit has held that the Prison Litigation Reform Act of 1995 ("PLRA"), 28 U.S.C. § 1915(b), does not apply to appeals of orders denying section 2254 petitions. *See Kincade v. Sparkman*, 117 F.3d 949, 951 (6th Cir. 1997); *cf. McGore v. Wrigglesworth*, 114 F.3d 601 (6th Cir. 1997) (instructing courts regarding proper PLRA procedures in prisoner civil rights cases). Rather, to seek leave to appeal *in forma pauperis* in a section 2254 case, and thereby avoid the $105 filing fee required by 28 U.S.C. §§ 1913 and 1917,[171] the petitioner must seek permission from the district court under Rule 24(a) of the Federal Rules of Appellate Procedure (*F.R.A.P.*). *Kincade*, 117 F.3d at 952. If the motion is denied, the petitioner may renew the motion in the appellate court.

F.R.A.P. 24(a) states, in pertinent part:

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aggravating circumstance is unconstitutional. The Court has previously determined that the constitutional claim is substantial, and the decision that the claim has been procedurally defaulted rests on the Court's determination that claims raised for the first time in the successive post-conviction proceeding may not be considered. However, because there is no evidence in the record that petitioner unsuccessfully urged post-conviction counsel to raise this issue at an earlier time, *see supra* page 231 n.161, the Court does not believe petitioner has raised a substantial issue with respect to whether he raised this claim in state court.

[171] The fee for docketing an appeal is $100. *See* Judicial Conference Schedule of Fees, P1, Note following 28 U.S.C. § 1913. Under 28 U.S.C. § 1917, a district court also charges a $5 fee.

> A party to an appeal in a district court who desire to proceed on appeal in forma pauperis shall file in the district court a motion to so proceed, together with an affidavit, showing, in the detail prescribed by Form 4 of the Appendix of Forms, the party's inability to pay fees and costs or to give security therefor, the party's belief that that party is entitled to redress, and a statement of the issues which that party intends to present on appeal.

The Rule further requires the district court to certify in writing whether the appeal is taken in good faith and to deny the certificate if the appeal would be frivolous.

In this case, the Court lacks current information concerning petitioner's financial condition and, therefore, the Court defers a ruling on this issue pending the filing by petitioner of an appropriate affidavit.

III. Stay of Execution

The petitioner's execution was previously stayed pursuant to 28 U.S.C. § 2251. Although the Petition has been dismissed, the Court has granted a certificate of appealability with respect to certain claims. Accordingly, petitioner's stay of execution will be continued provided that petitioner files a timely notice of appeal to the United States Court of Appeals for the Sixth Circuit.

IT IS SO ORDERED this 28th day of February, 2001.

BERNICE B. DONALD

UNITED STATES DISTRICT JUDGE

(2)

No. 03-1210

Supreme Court, U.S.
FILED
MAR 24 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

DONNIE E. JOHNSON,

Petitioner,

v.

RICKY BELL, Warden,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

PAUL G. SUMMERS
Attorney General & Reporter

MICHAEL E. MOORE
Solicitor General

ALICE B. LUSTRE*
Assistant Attorney General
425 Fifth Avenue North
P.O. Box 20207
Nashville, Tennessee 37202
(615) 741-4349

**Counsel of Record*

BEST AVAILABLE COPY

CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

1. Whether the court of appeals correctly applied the standard enunciated in *Strickland v. Washington* in determining that petitioner was not denied the effective assistance of counsel.

2. Whether a single use of the word "likely" constitutes the erroneous application of the *Strickland* prejudice standard when the opinion of the court of appeals repeatedly cites to *Strickland's* holding and to the "reasonable probability" standard set forth in that case.

3. Whether this Court has jurisdiction to review the denial of a certificate of appealability that was entered more than two years ago.

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OPINION BELOW

On September 10, 2003, in a published opinion, the United States Court of Appeals for the Sixth Circuit affirmed the district court's denial of Johnson's petition for a writ of habeas corpus. *Johnson v. Bell*, 344 F.3d 567 (6th Cir. 2003). (Pet.App. 3a) On November 25, 2003, in an unpublished order, the Court of Appeals denied Johnson's petition for rehearing and for rehearing *en banc*. (Pet.App. 1a)

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner, Donnie Johnson, was convicted in 1985 of the brutal, premeditated murder of his wife, Connie Johnson. After a sentencing hearing, petitioner was sentenced to death, the jury having found two aggravating circumstances: (1) the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind; and (2) the petitioner had previously been convicted of one or more felonies that involved the use or threat of violence. Petitioner's conviction and sentence were affirmed by the Tennessee Supreme Court on direct appeal. *State v. Johnson*, 743 S.W.2d 154 (Tenn. 1987) *cert. denied*, 108 S.Ct. 1303 (1988).

Petitioner subsequently sought state post-conviction relief. After an evidentiary hearing, the trial court denied

relief and that decision was affirmed on appeal. *Donnie E. Johnson v. State*, No. 61, 1991 WL 111130 (Tenn. Crim. App. June 26, 1991) *permission to appeal denied.* Petitioner then filed a second petition for post-conviction relief which was also denied by the trial court. On review, the Tennessee Court of Criminal Appeals initially reversed the trial court's holding, finding that petitioner had not personally waived certain issues. *Donnie Edward Johnson v. State*, No. 02C01-9111-CR-00237, 1994 WL 90483 (Tenn. Crim. App. Mar. 23, 1994). On appeal, the Tennessee Supreme Court remanded the case to the Court of Criminal Appeals for reconsideration in light of *House v. State*, 911 S.W.2d 705 (Tenn. 1995). On remand the court of criminal appeals affirmed the trial court's finding as to waiver and dismissed the petition. *Donnie E. Johnson v. State*, No. 02C01-9111-CR-00237, 1997 WL 141887 (Tenn. Crim. App. Mar. 27, 1997) *permission to appeal denied.*

On November 14, 1997, petitioner filed a petition for federal habeas corpus relief. On February 28, 2001, the district court issued an order denying relief on all of petitioner's claims and granting petitioner a certificate of appealability on the sole issue of whether he received ineffective assistance of counsel at the sentencing phase of his trial. *Johnson v. Bell*, No. 97-3052-DO (W.D.Tenn. Feb. 28, 2001). (Pet.App. 26a) Petitioner filed a notice of appeal and a motion to amend the certificate of appealability in the court of appeals and, on January 3, 2002, the Sixth Circuit denied petitioner's motion. (Pet.App. 25a) A second request to consider the amendment was likewise denied by the court on February 12, 2002. (Pet.App. 24a) Petitioner did not seek an order from this Court expanding the certificate of appealability. Following briefing and oral argument, the Sixth Circuit affirmed the judgment of the

district court denying habeas relief. A petition for rehearing and suggestion for rehearing en banc was denied on November 25, 2003. (Pet.App. 1a)

On February 19, 2004, petitioner filed a petition for writ of certiorari, seeking this Court's review of his claim of ineffective assistance of counsel and the denial of his motion to amend the certificate of appealability.

STATEMENT OF FACTS

On December 8, 1984, petitioner was at work when his wife, Connie Johnson, arrived to accompany him to dinner. Evidence showed that petitioner had been unfaithful in the past and had recently mentioned that he was contemplating a divorce. Connie Johnson died when petitioner forced a large plastic garbage bag into her mouth, resulting in strangulation and asphyxiation. According to the testimony, Ms. Johnson would have been conscious during some significant portion of the one-to four-minute ordeal. *State v. Johnson*, 743 S.W.2d at 156. Following the murder, petitioner enlisted the aid of a co-worker, Ronnie McCoy, to help him dispose of his wife's body. McCoy was on work release from a local penal farm at the time and was dependent upon petitioner for transportation to and from work. The two men placed Ms. Johnson's body in her van and drove it to a nearby shopping mall, where they left it parked, after which petitioner returned McCoy to the penal farm. *Id.*

The next day petitioner called his employer, James Force, to tell him that Ms. Johnson was missing. Mr. Force and his wife agreed to assist petitioner in searching for Ms. Johnson, and they were the ones to locate her van in

the mall parking lot. After the body was discovered, petitioner gave a statement to police in which he denied any knowledge of his wife's death. A search of the van revealed that Ms. Johnson's keys were missing. Those keys, along with some other personal items, were later found in petitioner's truck. Her sisters testified that the keys found in the truck were the only set that Ms. Johnson had for the van. *Id.* at 157.

During the sentencing phase of trial, petitioner, for the first time, asserted that it was Ronnie McCoy who had committed the murder and had forced petitioner to assist in disposing of the body. *Id.* at 157. Petitioner also presented the testimony of a minister who had visited with him while he was in jail. During the guilt phase, evidence had been introduced that petitioner was a good employee and that, on the day of the murder, petitioner and the victim seemed to be getting along. The State introduced evidence of petitioner's prior convictions for armed robbery and aggravated assault. The medical examiner was recalled to give further testimony regarding the murder itself, which the Tennessee Supreme Court noted was "inhuman and brutal to an almost indescribable degree." *Id.* The jury returned two aggravating factors and sentenced petitioner to death.

On post-conviction, petitioner alleged that his counsel were ineffective for failing to call various witnesses in mitigation. The witnesses presented during the state evidentiary hearing were members of petitioner's family, his employer, a long-time friend, and a jailor who observed petitioner's pretrial behavior. Family members stated that they had little or no contact with defense counsel but would have been willing to testify. If called, they would have said that petitioner was a good family man and

husband and that they were generally unaware of any problems in the petitioner's marriage. On cross-examination petitioner's sisters admitted that they were unaware of his relationships with other women. Petitioner's employer testified that he was a good worker. His friend stated that petitioner was a good family man but he was unaware of at least one of petitioner's extramarital relationships. A jailor testified that petitioner caused no trouble during pretrial confinement. Petitioner's minister testified as to petitioner's faith in God and his belief that he would one day have to give an accounting of his life to God.

Petitioner's counsel both testified that, although his family was cooperative in speaking with them, family members were unwilling to testify. The trial court found the testimony of counsel to be more credible, holding that the family members could not, or would not, testify. The court of criminal appeals found that, even if the family members had been called, their testimony would not have been helpful in light of petitioner's conviction for killing his wife. *Donnie E. Johnson v. State*, 1991 WL 111130 at *1-2.

ARGUMENT

I. THIS COURT SHOULD DECLINE REVIEW, AS THE COURT OF APPEALS CORRECTLY APPLIED THE STANDARD ENUNCIATED IN *STRICKLAND V. WASHINGTON* AND DETERMINED THAT PETITIONER WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

In its September 10, 2003, decision affirming the denial of habeas relief, the Sixth Circuit held that, even if one assumed that the deficient performance prong had been met, petitioner had failed to establish that, "but for counsel's unprofessional errors, the result of the proceeding would have been different," as required by this Court's holding in *Strickland v. Washington*, 466 U.S. 668 (1984). *Johnson v. Bell*, 344 F.3d 567, 574-75. In so holding, the court noted, as did the state court and the district court, that the evidence that petitioner was a good family man was clearly at odds with the brutal murder of his wife and that such testimony would have opened the door to additional evidence regarding petitioner's extramarital affairs, further undercutting any favorable impact of such testimony. *Id.* at 574.

In this Court petitioner asserts that the court of appeals applied an incorrect legal standard in deciding petitioner's claim and "rejected" this Court's holding in *Wiggins v. Smith*, 123 S.Ct. 2527 (2003) in favor of *Bell v. Cone*, 535 U.S. 685 (2002). A review of the circuit court's opinion, however, shows that this position is without merit. This argument also ignores the language of 28 U.S.C. § 2254(d), which requires a federal court to determine the objective reasonableness of a state-court decision in light of then-existing Supreme Court precedent.

Petitioner attempts to draw a non-existent distinction between the holdings of *Wiggins* and *Cone*. His argument is based on his assertion that *Wiggins* and *Cone* require differing standards of review in assessing the adequacy of counsel's performance under the Sixth Amendment. To the contrary, it is quite clear from these opinions that both are firmly grounded in the holding of *Strickland v. Washington*, the touchstone of Sixth Amendment right to counsel cases.

Petitioner seeks to distinguish these holdings by noting the language in *Wiggins* that cites to the American Bar Association's Guidelines addressing investigation of a defendant's background. (Petition at 9-10) The problem with this distinction is two-fold. First, to the extent that an "adoption" of the ABA Guidelines is inherent in the *Wiggins* opinion – and respondent does not agree that it is – such a requirement goes beyond the holding of *Strickland* and, under 28 U.S.C. § 2254(d), could not be utilized as a basis for granting relief in this case, as *Wiggins* post-dates the state court decision by approximately 12 years. Second, even if the ABA standards should be considered for guidance, they go only to the first prong of deficient performance. In this case, the court of appeals *assumed* deficient performance but found that petitioner failed to establish prejudice. *Johnson v. Bell*, 344 F.3d at 574.

A further flaw in petitioner's argument is that the court of appeals did, in fact, consider *Wiggins* along with *Cone* and this Court's holding in *Williams v. Taylor*, 529 U.S. 362 (2000). The court specifically compared the facts of this case to *Wiggins*, noting that, "[w]hile counsel in *Wiggins* had sufficient information about their client's horrific childhood to render their failure to pursue further investigation professionally unreasonable, there is nothing

to suggest that counsel in the instant case ignored known leads that might have helped them to prepare their case in mitigation." *Johnson v. Bell*, 344 F.3d at 573-74. The court also stated that "[t]he mitigating evidence proffered by petitioner falls short of the quantum required by *Wiggins*, *Cone*, and *Williams*." *Id.* at 574.

Nothing in the decision of the court of appeals demonstrates a failure or an inability to apply the standard set forth in *Strickland*. This Court should decline to review this claim.

II. THIS COURT SHOULD DECLINE REVIEW BECAUSE A SINGLE USAGE OF THE WORD "LIKELY" IN AN OPINION REPLETE WITH REFERENCES TO, AND QUOTATIONS FROM, *STRICKLAND* DOES NOT DEMONSTRATE THAT THE SIXTH CIRCUIT APPLIED AN INCORRECT STANDARD.

In his second issue, petitioner asserts that the opinion of the court of appeals is in error because the court applied an incorrect standard in assessing the prejudice prong of his ineffective assistance of counsel claim. This claim is based entirely on one sentence in the Sixth Circuit's opinion, in which the court stated that, in considering the mitigation evidence presented on post-conviction, "we cannot say that this testimony would likely have led to a different result." The problem with this argument is that it suffers from the same flaws for which this Court chastised the Ninth Circuit in *Woodford v. Visciotti*, 537 U.S. 19 (2003).

Petitioner's argument mischaracterizes the opinion of the Sixth Circuit and asks this Court to ignore the multiple

references to, and quotations from, *Strickland*. The court, after discussing the facts and the applicability of the AEDPA to this case, began its analysis of the ineffective assistance claim by noting that *Strickland* provides the appropriate test and that to satisfy the prejudice prong "a defendant must demonstrate a reasonable probability that 'but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Johnson v. Bell*, 344 F.3d at 573. In the paragraph immediately preceding the sentence relied upon by petitioner, the court stated that "[o]ur inquiry is limited to asking whether the testimony . . . would have created *a reasonable probability* that, had the jury heard from them, its verdict would have been different." *Id.* at 574 (emphasis added). The court then concluded, quoting *Strickland*, that "petitioner has not shown that, 'but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* at 574-75.

As in *Visciotti*, the court's opinion must be viewed in its totality, not as individual words taken out of context. Petitioner, like the Ninth Circuit, makes "no effort to reconcile the [Sixth Circuit's] use of the term [likely] with its use, elsewhere, of *Strickland's* term 'reasonably probable,' nor did it even acknowledge, much less discuss, the [Sixth Circuit's] proper framing of the question." *Visciotti*, 537 U.S. at 360. The issue does not warrant review by this Court.

III. CERTIORARI REVIEW OF THE REMAINING ISSUE PRESENTED BY PETITIONER MAY NOT BE GRANTED; THE SIXTH CIRCUIT DENIED A CERTIFICATE OF APPEALABILITY ON PETITIONER'S OTHER CLAIMS MORE THAN TWO YEARS AGO.

Petitioner also seeks this Court's review of the Sixth Circuit's denial of a certificate of appealability on several additional claims. The orders in question were issued on January 3 and February 12, 2002. Although this Court had certiorari jurisdiction under 28 U.S.C. § 1254(1) to review the Sixth Circuit's 2002 orders denying an amended certificate of appealability in this case, *Hohn v. United States*, 524 U.S. 236 (1998), petitioner's opportunity to seek certiorari review from that order has long since expired. 28 U.S.C. § 2101(c); U.S.Sup.Ct.R. 13.1, 13.5. As to this issue, then, the instant petition is jurisdictionally out of time. U.S.Sup.Ct.R. 13.2.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

PAUL G. SUMMERS
Attorney General & Reporter

MICHAEL E. MOORE
Solicitor General

ALICE B. LUSTRE *
Assistant Attorney General
425 Fifth Avenue North
P.O. Box 20207
Nashville, Tennessee 37202
(615) 741-4349

* *Counsel of Record*

CORRECTED COPY

(3)

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(Capital Case)

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In the Supreme Court of the United States

DONNIE E. JOHNSON,

Petitioner,

v.

RICKY BELL, WARDEN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY BRIEF

C. MARK PICKRELL
Counsel of Record
3200 WEST END AVENUE
SUITE 500
P.O. BOX 50478
NASHVILLE, TN 37205-0478
(615) 356-4978

CHRISTOPHER M. MINTON
OFFICE OF THE FEDERAL PUBLIC DEFENDER
810 BROADWAY
SUITE 210
NASHVILLE, TN 37203
(615) 736-5047

Counsel for Petitioner

Becker Gallagher Legal Publishing, Inc.
800.890.5001

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ARGUMENT

In its brief in opposition to the petition, the Respondent (the State of Tennessee, on behalf of its warden, Ricky Bell) finds error in each of the court of appeals' two central holdings in the decision below. Yet the Respondent would have this Court deny review. The Petitioner respectfully submits that the Respondent's own brief shows that review of the court of appeals' decision – which is doubly flawed by the Respondent's own analysis – is warranted.

Additionally, the State of Tennessee argues, without citation to any interpreting authority, that this Court lacks jurisdiction to review the court of appeals' denial, at the outset of his appeal, of Donnie Johnson's motion for a certificate of appealability. The relevant statutes cited by the Respondent, as well as this Court's actual precedents, belie Respondent's jurisdictional argument.

I. DEFICIENT PERFORMANCE.

In its brief in opposition, the Respondent writes, "Petitioner attempts to draw a non-existent distinction between the holdings of *Wiggins* and *Cone*," referring to *Wiggins v. Smith*, 123 S. Ct. 2527 (2003) and *Bell v. Cone*, 535 U.S. 685 (2002). Brief in Opposition at 7. The Respondent fails to note that the contradiction between *Wiggins* and *Cone* has not been drawn in this case just by the Petitioner, but, far more importantly, the contradiction was described and emphasized by the court of appeals. See *Johnson v. Bell*, 344 F.3d at 572-74. The identification and resolution of the contradiction between *Wiggins* and *Cone* by the court of appeals was the initial analytical hurdle that the court had to resolve in Johnson's appeal.

In its decision, the court of appeals initiates its entire analysis of the first, "deficiency" prong of *Strickland v. Washington* with the court of appeals' understanding that this Court has not yet resolved the proper application of the *Strickland* standard to capital-sentence mitigation investigations. *Johnson v. Bell*, 344 F.3d 567, 572 (6th Cir. 2003). Moreover, the court of appeals specifically cites *Wiggins* and *Cone* as contradictory interpretations of the *Strickland* standard that must be resolved for the court of appeals to decide Donnie Johnson's appeal. *Id.* at 573. Therefore, if the State of Tennessee is correct that it would be error to "draw a distinction" between this Court's decisions in *Wiggins* and *Cone,* then that error lies first, foremost, and fundamentally with the decision of the court of appeals below. If, as the State of Tennessee apparently believes, the court of appeals' decision is entirely premised on "a non-existent distinction," then this Court should accept the petition and correct the court of appeals' misunderstanding of the interplay of *Wiggins* and *Cone*.

Because the State of Tennessee has rejected the very basis of the court of appeals' decision on the "deficiency" prong of the *Strickland* standard, an analysis of the Respondent's secondary points on this issue would be of little benefit. One assertion in the brief in opposition bears further comment, however. In its brief, the Respondent writes, "In this case, the court of appeals assumed deficient performance but found that petitioner failed to establish prejudice." Brief in Opposition at 7. This statement appears to imply that the court of appeals did not actually decide Donnie Johnson's appeal based on the first prong (the "deficiency" prong) of the *Strickland* standard. Any such implication is false. The court of appeals specifically and explicitly affirmed the district court's decision because, according to the court of appeals, the district court correctly concluded, "[Johnson's trial]

counsel satisfied the Sixth Amendment standards governing the right to effective representation as defined by *Strickland v. Washington* . . . ." *Johnson v. Bell*, 344 F.3d at 569. *See also*, *id.* at 573 ("[W]e are hard-pressed to reconcile *Cone* with the conclusion that counsel rendered constitutionally ineffective assistance . . . ."). The Respondent's arguments simply cannot alter the basic fact that the court of appeals' honest and admitted confusion over whether to apply *Wiggins* or *Cone* to Donnie Johnson's appeal squarely affected the central holding of the court of appeals' decision.

II. EFFECT OF COUNSEL'S DEFICIENT PERFORMANCE.

Having apparently found error with the court of appeals' central holding, the Respondent similarly disagrees with the court of appeals' second, alternative holding under the second prong of *Strickland v. Washington*. The court of appeals specifically denied Donnie Johnson's appeal because the court of appeals concluded that correction of Johnson's attorneys' errors would not "likely have led to a different result." *Johnson v. Bell*, 344 F.3d at 574. The court of appeals' holding clearly conflicts with this Court's decision in *Strickland* (which explicitly rejected a "likely" standard of review for the second prong of its standard). *Cf.*, Brief of the Petitioner at 14-15.

Rather than defending the court of appeals' holding, the Respondent instead tries to rehabilitate the court of appeals's clearly-flawed holding by asserting that the court of appeals surrounded its holding with enough of this Court's additional language in *Strickland* to merit overlooking the court's actual reasoning. See Brief in Opposition at 8-9 (citing *Woodford v. Visciotti*, 537 U.S. 19 (2003)). The Respondent's argument reduces our system of law to mere window-dressing, where

a court's actual decision does not matter as long as the court quotes a sufficient quantum of precedential language. The Respondent's approach should be rejected in any type of case, but particularly so in a death-penalty case. The substance of the court of appeals' decision, as expressed in its specific holding, must be the primary basis for understanding whether the court of appeals' decision was correct. On that point, the State of Tennessee makes no argument.

Moreover, contrary to the assertion of the Respondent, this Court's decision in *Visciotti* supports Donnie Johnson's petition, because: 1) *Visciotti* reinforces the necessity of reviewing the actual substance of lower-court decisions on habeas review; and 2) *Visciotti* stands for the basic proposition that a "likely" standard of review of the effect of any attorney's deficient performance is too high under *Strickland*. In *Visciotti*, the California Supreme Court repeatedly used the term "reasonably probable" to define its understanding of the second *Strickland* prong, and the Ninth Circuit found the California Supreme Court's decision to be erroneous because, in one instance, it used the term "probable" without the modifier "reasonably." *Visciotti*, 537 U.S. at 23-24. This Court overturned the Ninth Circuit because – in its actual substance – the California Supreme Court used a standard that was appreciably lower than a "probable" (i.e., "likely") standard. *Id.* The State of Tennessee in this case, however, makes no similar argument that the court of appeals below – in the substance of its actual decision – used a standard that was appreciably lower than a "probable" or "likely" standard. The State cannot even make that argument, because the court of appeals actually did use an unconstitutionally-high "likely" standard of review. See *Johnson v. Bell*, 344 F.3d at 574. Therefore, the State of Tennessee now simply expresses the wan hope that, without regard to the actual substance of its decision, the court of

appeals quoted sufficient amounts of this Court's language in *Strickland* to avoid further review. The State of Tennessee's argument, by seeking to use the form of the court of appeals' decision as an excuse to avoid examining the substance of the decision, turns *Visciotti* on its head.

III. JURISDICTION TO REVIEW THE DENIAL OF THE CERTIFICATE OF APPEALABILITY.

In its brief in opposition, the Respondent asserts that this Court lacks jurisdiction to review the court of appeals' denial of Donnie Johnson's motions to expand the certificate of appealability. Brief in Opposition at 10. In support of this proposition, the Respondent cites 28 U.S.C. §§ 1254, 2101(c) and Sup. Ct. R. 13. A simple examination of Respondent's citations, as well as relevant authority of this Court, shows that Respondent's jurisdictional argument is baseless.

28 U.S.C. § 1254 provides, in pertinent part: "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . . ." As the Respondent correctly points out, because this Court has jurisdiction over cases in the courts of appeals prior to judgment in those courts, this Court possesses jurisdiction to review a court of appeals' denial of a certificate of appealability even prior to final judgment in the court of appeals. *E.g.*, *Hohn v. United States*, 524 U.S. 236 (1998)(cited by the Respondent). *See also*, *Miller-El v. Cockrell*, 537 U.S. 322 (2003)(permitting certiorari review of a COA prior to final disposition in the court of appeals). But the fact that a preliminary order of a court of appeals is reviewable by this Court prior to a final decision in the court of appeals obviously does not, pursuant the explicit language

of section 1254(1), bar review of that preliminary decision by this Court following the court of appeals' final decision. *E.g.*, *Major League Baseball Players Assoc. v. Garvey*, 121 S. Ct. 1724, 1727 fn. 1 (2001)("[W]e have authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent judgments of the Court of Appeals."). Furthermore, nothing in 28 U.S.C. § 2101 alters this basic reading of section 1254; section 2101 simply requires that a petition for writ of certiorari be filed within 90 days of the Court of Appeals' final decision, as occurred in this case.

Having made only a flawed jurisdictional argument regarding Donnie Johnson's COA claims, the Respondent is silent on the merits of Johnson's petition on this issue.

CONCLUSION

The petition should be granted.

Respectfully Submitted,

C. Mark Pickrell
Counsel of Record
3200 West End Avenue
Suite 500
P.O. Box 50478
Nashville, Tennessee 37205-0478
(615) 356-4978

Christopher M. Minton
Office of the Federal Public Defender
810 Broadway
Suite 200
Nashville, Tennessee 37203
(615) 736-5047